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No. 97-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,

Petitioner,

v.

VALORIE LYNN GREAR AND PAUL C. NORDBERG,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a circuit court of appeals is jurisdictionally barred from hearing an appeal from a trial court order compelling the disclosure of privileged communications, or whether such an appeal properly comes within the "collateral order" doctrine laid down by the Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

2. Whether a circuit court of appeals is jurisdictionally barred from reviewing a petition for mandamus taken from a trial court order compelling the disclosure of privileged communications because a party is obliged to disobey the order and go into contempt before it can seek any review on the merits?

PARTIES TO THE PROCEEDING

Petitioner General Motors Corporation is a defendant in this case and was both the appellant below and the real party in interest in the separate proceeding on its petition for mandamus. Karol R. Vernon and Vernbrook, Inc., were also named as defendants. Pursuant to Supreme Court Rule 29.6, General Motors advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 21, 1996:

Asset Leasing GmbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH

Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co., Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in the following entities:

American Mobile Satellite Corp.
Detroit Diesel Corp.
Fiem Sung San (India) Limited
GMFanuc Robotics Corp.
Isuzu Motors Limited
Motor Enterprises, Inc.
New United Manufacturing, Inc.
Nippon Avionics Co., Limited
PanAmSat Corp.
Suzuki Motor Corp.

Valorie Lynn Grear and her husband, Paul C. Nordberg, are the plaintiffs in this case, having brought this suit in their individual capacities, and were appellees and respondents

below. The Honorable Julia Smith Gibbons of the United States District Court for the Western District of Tennessee, who serves as the trial judge in this case, was named as a respondent in the petition for mandamus filed below.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner respectfully petitions for a writ of *certiorari* to review the orders entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

The Sixth Circuit's twin rulings -- which held that a court of appeals lacks jurisdiction to entertain either an interlocutory appeal or a petition for writ of mandamus challenging a trial court order compelling the disclosure of privileged communications -- create a three-way circuit split and impose an undue burden on litigants seeking to protect privileged documents. Every other circuit to have addressed the issue has

concluded that parties have one or both of these avenues of review available to challenge a trial court's compelled disclosure of documents or other communications protected by the attorney-client privilege and work product doctrine. By requiring litigants to disobey orders compelling disclosure of privileged documents and go into contempt before seeking appellate review, the Sixth Circuit has effectively ordered district court bailiffs to guard the door to the court of appeals. This draconian rule -- which requires litigants to brave the threat of sweeping discovery sanctions, substantial fines, and permanent harm to reputation, before they would be authorized even to seek appellate review -- would all but eliminate judicial protection of "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

OPINIONS BELOW

The District Court's order compelling the disclosure of privileged communications is unreported and is reprinted in the Appendix to this petition ("Pet. App.") at 10a. It affirmed a magistrate's order to the same effect that is reprinted at Pet. App. 1a-9a. In order to obtain review of the disclosure order, General Motors filed a notice of appeal and also petitioned for mandamus. The Court of Appeals initially granted a temporary stay of the disclosure order, *see id.* 12a, but later issued two related orders resolving the matter, from which this petition is taken. The first order dismissed the appeal, which was found to be barred on jurisdictional grounds, and dissolved the temporary stay. *See id.* 14a-15a. The second order denied the petition for mandamus, which was also found to be barred on jurisdictional grounds, and dissolved the temporary stay. *See id.* 16a-17a.

STATEMENT OF JURISDICTION

The Court of Appeals entered the orders under review here on September 17, 1997. *See* Pet. App. 14a; *see also id.* 16a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

28 U.S.C. § 1651(d) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

A. The Task Force Memorandum.

The document whose privileged character is at issue between the parties here -- the so-called "Task Force Memorandum" -- is a ten-page confidential memorandum written in April 1990 by two General Motors in-house lawyers, Gary P. Toth and Douglas E. Brown, and addressed to a third in-house lawyer, James A. Durkin. At that time, Mr. Durkin was legal counsel to the senior committee that was responsible for advising the Corporation on technical issues. Mr. Toth was a principal legal advisor to General Motors' Automatic Restraint Task Force ("the Task Force"). The Task Force, which consisted of about a dozen engineers, was charged with providing the General Motors legal staff with information and engineering evaluations on the technical issues raised in connection with anticipated litigation involving General Motors' door-mounted restraint systems. *See* Pet. App. 24a-25a (Durkin Affidavit).

Early in 1990, Mr. Durkin asked Messrs. Toth and Brown to prepare a memorandum analyzing available technical information related to the use of automatic belt systems. They

responded to this request by producing the confidential Task Force Memorandum, with the anticipation that it would remain confidential and be used solely to provide legal advice and defend litigation claims against General Motors. Mr. Durkin forwarded the memorandum to a select few individuals at General Motors on a need-to-know basis, as analytical support for the legal advice he had provided them.

In order to remove any doubt about the indisputably privileged nature of the Task Force Memorandum, General Motors has provided it for *in camera* review by this Court, by lodging it as a separate sealed appendix accompanying this petition. *See* Appendix A (filed under seal).

B. The Trial Court Proceedings.

This dispute over the privileged character of the Task Force Memorandum arises from a products liability action. Plaintiff Valorie Grear sustained serious injuries as the result of a 1995 accident in her Buick Skylark. She and her husband filed this action against General Motors, alleging that the car's door-mounted passive restraint and door latch systems were defectively designed.

On February 10, 1997, plaintiffs served on General Motors a request to produce all documents relating to the meetings of and findings, conclusions, and studies of the Task Force. In addition, plaintiffs served on General Motors a First Set of Interrogatories, which requested, *inter alia*, that General Motors produce a privilege log for all documents that it had not produced in response to plaintiffs' requests. General Motors objected to this request on grounds of attorney-client privilege and the work product doctrine. In response to plaintiffs' request for a privilege log, General Motors stated that it would either provide a privilege log for the Task Force documents or provide them to the court for *in camera* inspection.

Dissatisfied with General Motors' responses -- including its assurance that it would produce either a privilege log or the Task Force documents for *in camera* review -- the plaintiffs moved to compel production of those documents. General

Motors immediately sought a protective order, explaining that it had declined to produce these documents -- including the Task Force Memorandum -- because they are privileged.

On May 22, 1997, General Motors submitted the privileged Task Force documents to the Court for *in camera* inspection, and withdrew the rest of its privilege claims. The next day, the parties discussed these documents at a settlement conference before the Magistrate Judge. Following that meeting, the Magistrate Judge ordered General Motors to produce a privilege log identifying the Task Force documents that remained undisclosed. Within a week, General Motors duly produced the requested privilege log, which listed and described, *inter alia*, the Task Force Memorandum. At the same time, General Motors submitted the privileged documents (including the Task Force Memorandum) under seal for *in camera* review.

C. The Trial Court Rulings.

In an Order dated July 7, 1997, the Magistrate Judge granted plaintiffs' Motion to Compel and denied General Motors' Motion for a Protective Order. *See* Pet. App. 9a. Significantly, the Magistrate Judge did *not* find that any of the then-undisclosed Task Force documents were not privileged; indeed, the Magistrate Judge refused even to review the privileged documents *in camera*. Instead, the Magistrate Judge granted the Motion to Compel because she determined that General Motors had "waived its asserted privileges . . . for failure to properly and timely describe the documents," even though General Motors has clearly and consistently reiterated its position that this specific document is protected by the attorney-client privilege. *Id.* 4a. The Magistrate Judge directed General Motors to produce the Task Force documents by July 15, 1997.

After granting an initial stay of the Magistrate Judge's ruling, the District Court ultimately affirmed the Magistrate Judge's order, stating only that "[t]he magistrate judge's ruling is not clearly erroneous or contrary to law." Pet. App. 10a. General Motors immediately appealed, petitioned for a writ of

mandamus, and moved for a stay pending review by the Sixth Circuit. The District Court denied the stay, but extended the deadline for producing the Task Force Memorandum to August 15, 1997. *Id.* 11a.

D. The Procedure Followed by the Court of Appeals.

On August 13, 1997, the Sixth Circuit issued an order that temporarily stayed the trial court order pending its disposition of the appeal and petition for mandamus filed by General Motors. Pet. App. 12a-13a.

In two orders entered on September 17, 1997, the Sixth Circuit: (1) granted plaintiffs' motion to dismiss; (2) denied General Motors' petition for writ of mandamus; and (3) dissolved the temporary stay. In denying both the appeal and the mandamus petition, the Sixth Circuit did not rule on the merits of either submission. Instead, it held that it lacked jurisdiction to entertain *either* an interlocutory appeal *or* a request for mandamus relief. In particular, the Sixth Circuit expressly rejected the recent decision by the Third Circuit in *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), which had held that *both* avenues of relief are properly available to a party seeking to resist disclosure of documents protected by the attorney-client privilege, bluntly stating that "we decline to adopt the reasoning of that case." Pet. App. 15a. The Sixth Circuit held that "[a]lthough a direct appeal following final judgment is an inadequate remedy, GM can obtain appellate review by submitting to contempt and appealing the contempt ruling." *Id.* 16a-17a; *see also id.* 15a.

Upon receipt of these orders, General Motors moved in the Sixth Circuit for a stay of the mandate pursuant to Fed. R. App. P. 41(b), seeking temporary relief pending review by this Court. On October 3, 1997, the Sixth Circuit granted the motion for stay and gave General Motors time in which to prepare and file this petition for *certiorari*. Pet. App. 18a-19a.

REASONS FOR GRANTING THE WRIT

This petition cleanly presents a basic procedural issue of great importance to judicial administration in the federal courts,

on which there is a clear and irreconcilable three-way split among the circuit courts of appeals. The question presented is what mechanism shall be available to litigants in the federal courts to seek immediate relief from an order requiring the disclosure of documents that are protected by the attorney-client privilege. The Third Circuit has recently ruled that a party may take an interlocutory appeal in these circumstances under 28 U.S.C. § 1291, and that mandamus relief is also available pursuant to 28 U.S.C. § 1651 as an alternative means of obtaining immediate review. *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997).

In contrast, most courts do not permit an interlocutory appeal in those circumstances, but do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1484 (1997); *In re Bieter Co.*, 16 F.3d 929, 931 (8th Cir. 1994); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992); *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1490-92 (9th Cir. 1989); *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971).

The Sixth Circuit, however, has now imposed a far more draconian rule, holding that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief -- indeed, that both avenues of relief are *barred* on jurisdictional grounds. *See* Pet. App.15a; *see also id.* 16a-17a. Instead, the Sixth Circuit has held that in order to obtain immediate review, a party must go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions. Other circuit courts have squarely rejected this position, holding that forcing a party to engage in contumacious conduct is undesirable and creates the kind of irreparable harm that justifies immediate review on mandamus. *See, e.g., United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir.

1966). Courts have also noted that sanctions imposed against a party are not subject to immediate appeal unless the trial court chooses to proceed by way of criminal contempt, rather than through civil coercive contempt or by imposing some form of discovery sanctions. *See, e.g., Admiral Ins. Co.*, 881 F.2d at 1490-92. Those courts have thus recognized that forcing a party to disobey the trial court's order and submit to sanctions offers no assurance that the party can avoid irreparable harm by pursuing an immediate appeal.

This three-way split among the circuit courts on an issue so basic to judicial administration and so critical to the preservation of the legally sacrosanct attorney-client privilege warrants review on the merits in this case.

I. THE DECISION BELOW RAISES IMPORTANT ISSUES OF APPELLATE JURISDICTION ON WHICH THE CIRCUITS ARE IN CONFLICT.

Whether a party to litigation has available some procedural avenue by which it can challenge an erroneous trial court order requiring disclosure of privileged communications is self-evidently an important issue of judicial administration. This issue arises frequently, and can affect almost any civil or criminal case filed in federal court. A circuit conflict on such an essential and ubiquitous issue demands immediate review by this Court, if for no other reason than simply to lay down a clear rule that can be applied uniformly by all of the lower federal courts and followed clearly by litigants. As this petition demonstrates, this procedural issue has generated a clear and irreconcilable three-way split among the circuit courts.

The Third Circuit has recently ruled that an appellate court has jurisdiction to review a party's interlocutory appeal in these circumstances, and that mandamus relief would also be available in the alternative. *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). In a scholarly opinion by Judge Becker, the Court of Appeals undertook a careful review of the jurisdictional issues surrounding the possibility of an interlocutory appeal. After a close examination of the three prongs of the "collateral order" doctrine laid down by this

Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the court concluded that discovery orders compelling disclosure of privileged communications are subject to immediate appeal because they: (i) conclusively determine the disputed issue; (ii) resolve an important issue that is separate from the merits; and (iii) are effectively unreviewable on appeal from a final judgment. *See In re Ford Motor Co.*, 110 F.3d at 957-64.

The Third Circuit's holding that discovery orders compelling the disclosure of privileged communications are immediately appealable rests on a compelling analysis of the *Cohen* "collateral order" doctrine. As the court explained, the first and third prongs of the doctrine are obviously met, for the order "conclusively determines the disputed issue," *Id.* at 958, and in terms of protecting privileged communications from disclosure, the party is "irremediably disadvantaged by erroneous disclosure" because "the cat is already out of the bag," *id.* at 963. These conclusions are indisputable.

With respect to the second prong of the *Cohen* doctrine, the Third Circuit also was correct in holding that the issue of compelled disclosure of privileged communications is both separate from the merits of the underlying case and important enough to warrant immediate review. *Id.* at 958-62. On the issue of importance, in particular, the court held that "because of the imperative of preventing impairment of some institutionally significant status or relationship [here, the attorney-client relation], the danger of denying justice by reason of delay in appellate adjudication outweighed the inefficiencies flowing from interlocutory appeal." *Id.* at 960. The court so concluded after weighing the importance of the attorney-client privilege, which it recognized is "at the heart of the adversary system," and indeed "is one of the pillars that supports the edifice that is our adversary system." *Id.* at 961-62. The court's analysis thus mirrors this Court's own statements about the sacrosanct character of the privilege, which ensures the "observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389.

In addition, the Third Circuit went on to emphasize that even "if we did not have appellate jurisdiction, we would have mandamus jurisdiction to review" such orders. *In re Ford Motor Co.*, 110 F.3d at 962. In reaching this conclusion, the court rejected the practicality of later review of this category of trial court orders, holding that "there is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material." *Id.* at 964. (It bears emphasis here that this statement by the court speaks to the efficacy *both* of immediate appellate review *and* discretionary mandamus review.) In the end, the court decided that it would be preferable to review such orders on direct appeal under the "collateral order" doctrine because mandamus review is more limited, and affords "less opportunity to provide guidance for future cases." *Id.* But under the Third Circuit's approach, a party may seek immediate review of such orders by utilizing either mechanism.

In contrast, most courts have not permitted an interlocutory appeal in those circumstances. *See, e.g., Texaco, Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 43-44 & n.4 (5th Cir. 1993); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993). Yet those same courts do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Burlington Northern*, 822 F.2d at 522 (Fifth Circuit holds that mandamus is appropriate to protect claims of privilege); *Jenkins*, 670 F.2d at 917 (Tenth Circuit holds the same). Virtually every other circuit court likewise allows mandamus review: the Federal Circuit, *see, e.g., In re Regents of Univ. of Cal.*, 101 F.3d at 1387 ("writ of mandamus may be sought to prevent the wrongful exposure of privileged communications"); the Eighth Circuit, *see, e.g., In re Bieter Co.*, 16 F.3d at 931-32 (mandamus authorized because attorney-client privilege "has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy"); the Second Circuit, *see, e.g., Chase Manhattan*, 964 F.2d at 163 (granting mandamus relief because later appeal is an inadequate remedy to protect valid claims of privilege); the Ninth Circuit,

see, e.g., Admiral Ins. Co., 881 F.2d at 1490-92 (same); the Fourth Circuit, *see, e.g., Rowley*, 502 F.2d at 1335 (mandamus is appropriate to protect claim of privilege because appeal from either a final judgment or a contempt citation would be inadequate); and the Seventh Circuit, *see, e.g., Harper & Row*, 423 F.2d at 492 (appellate review after disclosure of attorney-client privileged information is inadequate and mandamus is proper).

This great weight of authority reflects the view, embraced by the vast majority of lower federal courts, that a mechanism must be kept available to permit some form of immediate review of trial court orders requiring the disclosure of privileged communications. Accordingly, even if the Third Circuit's conclusions on the applicability of the *Cohen* doctrine were judged to be incorrect for some reason, its alternative holding that mandamus review is available in these circumstances is surely correct. This holding is in agreement with every other circuit court that has considered the issue -- except for the Sixth Circuit.

The Sixth Circuit has now imposed a rigid rule that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief. *See* Pet. App. 14a-15a; *see also id.* 16a-17a. Instead, a party will be forced to go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions in order to vindicate its claim of privilege. *See id.* 15a; *see also id.* 16a-17a. Indeed, the Sixth Circuit has held that in this situation it has jurisdiction to consider *neither* an appeal *nor* a petition for mandamus -- an approach that disagrees with the position taken by every other circuit court of appeals.

Thus, the Sixth Circuit has simply rejected the analysis that undergirds the overwhelming body of precedent from the other circuit courts. Once again, the principal foundation for all of those other decisions is the inadequacy of alternative remedies, such as appeal after a final judgment or possible (though not certain) appeal from any imposition of contempt sanctions. *See, e.g., In re Bieter Co.*, 16 F.3d at 931 (mandamus review

appropriate due to "inadequacy of later review as a remedy"); *Chase Manhattan*, 964 F.2d at 163 (granting mandamus relief because "the privilege will be lost in the particular case if review must await a final judgment"); *Admiral Ins. Co.*, 881 F.2d at 1490-92 (granting mandamus relief because irreparable harm can result from forced disclosure of privileged material and civil contempt sanctions are not subject to immediate appeal); *Jenkins*, 670 F.2d at 917 (where privileged information is ordered to be disclosed, "appeal after a final decision is an inadequate remedy; in these circumstances, an appellate court may exercise its mandamus power"); *Rowley*, 502 F.2d at 1335 (mandamus is appropriate where a party's only other avenue for review of an order compelling disclosure of privileged information is to appeal from entry of a contempt citation). The Sixth Circuit's position, and the essential legal analysis upon which it rests, is simply irreconcilable with this overwhelming body of decisions by the other courts of appeals.

This three-way split among the circuit courts on an issue so basic to federal litigation and to preservation of the legally sacred attorney-client privilege is untenable as a matter of sound judicial administration. The issue is cleanly presented in this case, and review is warranted to resolve the conflict and lay down clear guidance for the lower federal trial courts and appellate courts.

II. THE SIXTH CIRCUIT'S APPROACH ERECTS UNDULY SEVERE HURDLES TO PROTECTING THE ATTORNEY-CLIENT PRIVILEGE.

A. Effective Elimination of Mandamus Review.

The uniquely oppressive approach embraced by the Sixth Circuit poses severe obstacles to appellate review of orders that threaten the vital interests protected by the longstanding doctrine of attorney-client privilege. In particular, the Sixth Circuit's approach would eliminate direct mandamus review as a necessary tool that is available to protect the attorney-client privilege. It thus clashes with this Court's decisions, which have stressed that mandamus review provides a logical method -- and at times an essential method -- by which to supervise

important issues concerning the administration of justice in the lower courts. *See, e.g., Will v. United States*, 389 U.S. 90, 107 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). To the extent that the Court has cautioned that mandamus should not be used as "a substitute for an appeal," *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), this caveat is amply addressed by limiting discretionary review in mandamus only to important questions of law, where guidance would be especially useful to the administration of justice in the lower courts, and as an escape hatch to the rigors of the finality rule, *id.* at 110-112.

The Sixth Circuit, however, has now held that even the mere possibility of such mandamus review *is jurisdictionally barred* and that a party instead must flout trial court orders and incur contempt sanctions before review can be sought to vindicate a valid claim of attorney-client privilege. *See* Pet. App. 15a; *see also id.* 16a-17a. By placing the unavailability of mandamus review on jurisdictional grounds, the Sixth Circuit's approach would clearly circumscribe the necessary use of the writ and indeed would effectively eliminate it as an option for courts and litigants in these circumstances.

Moreover, the Sixth Circuit's erroneous conclusion that it is barred on jurisdictional grounds from *even considering* whether to grant mandamus relief is particularly troublesome in this case, given the substantial importance of the underlying substantive issues raised in General Motors' mandamus petition. The District Court's order compelling the disclosure of privileged communications raises unsettled questions about the extent to which an extra-textual requirement to create a privilege log can properly be imported into Rule 26 of the Federal Rules of Civil Procedure. On its face, the Rule contains no such rigid requirement; instead, it merely requires a party raising a privilege objection to "make the claim expressly" and to "describe the nature of the documents" sufficiently to "enable other parties to assess the applicability of the privilege." *See* Fed. R. Civ. P. 26(b)(5). On the facts of this case, it is plain that General Motors complied with the absolute letter and spirit of this Rule; yet the Sixth Circuit has

erected unduly severe hurdles to parties like General Motors who simply seek to vindicate the legitimate claims of privilege traditionally afforded them.

B. The Fatal Flaw in the Sixth Circuit's Analysis: A Party Cannot Simply Opt for Criminal Contempt.

Even on its own terms, the Sixth Circuit's approach is inherently flawed. The Court of Appeals recognized that where the sanctity of privileged communications is at stake, "a direct appeal following final judgment is an inadequate remedy." Pet. App. 16a-17a. Nonetheless, it held that litigants are jurisdictionally barred from obtaining immediate review of such orders either by appeal or by mandamus, and must instead "obtain appellate review by submitting to contempt and appealing the contempt ruling." *Id.* This prescription, however, overlooks the fact that even if a party were to follow this suggestion and deliberately disobey a discovery order requiring it to disclose privileged communications, the trial court may decide to proceed by way of coercive civil contempt or by imposing discovery sanctions, neither of which can be appealed by a party until a final judgment has been entered. *See, e.g., Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (party may not take an immediate appeal from civil contempt sanctions); *Lamar Fin. Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990) (same); *Admiral Ins. Co.*, 881 F.2d at 1491 (same); *R.R. Donnelley & Sons Co. v. F.T.C.*, 931 F.2d 430, 431 (7th Cir. 1991) (discovery sanctions not appealable until after final judgment).

Thus, even on its own terms, the Sixth Circuit's approach provides no assurance that a party will be able to seek to vindicate its lawful privileges in any meaningful way, even after it has been forced to assume an unappetizing and unwelcome posture of judicial intransigence. If a party is obliged to follow the rule now embraced by the Sixth Circuit, it will be barred from obtaining any immediate review of a trial court order compelling the disclosure of privileged communications until it first disobeys that order and risks being held in contempt. If, at that juncture, the trial court decides to

respond to this flouting of its order by imposing civil contempt sanctions -- such as daily fines or continued imprisonment until the party submits to these coercive measures and discloses the privileged communications -- the intransigent party cannot obtain any immediate review of these sanctions at all. If, instead, the trial court decides to respond by imposing discovery sanctions or even defaulting the noncomplying party, then once again no review can be had at all -- either through an appeal or by way of mandamus -- until a final judgment has been entered in the case. But even the Sixth Circuit recognized that this situation is untenable, because "a direct appeal following final judgment is an inadequate remedy" to protect the attorney-client privilege. Pet. App. 16a-17a. Indeed, *only* if the trial court chose to proceed by imposing criminal contempt sanctions would the Sixth Circuit be correct in its blithe assumption that the noncomplying party will be able to seek immediate review to vindicate its lawful claim of privilege.

C. Forcing Parties into Contempt Is Unsatisfactory.

The Sixth Circuit's approach also is an utterly unsatisfactory means of ensuring effective judicial management. It treats casually the prospect that in many cases, litigants will be forced to engage in contumacious conduct in order to correct an erroneous ruling and vindicate their clear legal rights. Indeed, the Sixth Circuit's approach emphatically *requires* litigants to disobey trial court orders and go into contempt of those orders before they can seek to vindicate their rights and the legal privileges afforded them by law. This cynical approach breeds unwelcome disrespect for legal authority. And it ignores or underestimates the frictions and intransigence that this regime would build into the administration of justice in the trial courts. As such, it is inconsistent with this Court's recognition that where the only alternatives to compliance with an order "would risk serious criminal and civil penalties," it is appropriate to permit judicial review of a party's legal challenges to that order. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967).

Moreover, the Sixth Circuit's approach is unduly oppressive because it disregards the immediate hardship for litigants who are thus obliged to suffer the obloquy of being held in contempt. As Judge Haynsworth has aptly stated, no public or private litigant should be put to this choice:

> [A]ny litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful. . . . [C]ontempt proceedings . . . as a prerequisite to appellate review of the order would be such a hardship upon any litigant or witness that resort to a petition for mandamus or prohibition ought to be permitted.

Hemphill, 369 F.2d at 543. Thus, the Sixth Circuit fails to recognize the practical costs that its approach would impose upon litigants who simply wish in good faith to preserve their rights, without being branded as criminals or engaging in sanctionable conduct. By contrast, in other contexts this Court has recognized that even the imminent *threat* of criminal prosecution presents sufficient harm to confer standing to bring lawsuits and raise legal claims that otherwise would be barred at the jurisdictional threshold. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 10-14 (1972); *see also O'Shea v. Littleton*, 414 U.S. 488, 498 (1974).

In addition, even if a party were able to stand the pressure of incurring contempt sanctions and seeking later review of any such order, this Court has indicated that such an oppressive judicial regime would raise serious due process concerns. In *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), for example, the Court considered a statutory scheme whereby the only mechanism available for challenging certain rate orders was to stand in contempt of the law and incur cumulative penalties that mounted with each passing day. Recognizing that the obligatory regime of cumulative penalties was "such as might well deter even the boldest and most confident," the

Court unanimously held that "[o]bviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate." *Id.* at 336-337. *See also Ex parte Young*, 209 U.S. 123, 147 (1908) (same).

In short, the Sixth Circuit's problematic approach to the important procedural issues raised in this case warrants plenary review at this time.

III. THIS PETITION ADDRESSES IMPORTANT ISSUES OF JUDICIAL ADMINISTRATION THAT DIRECTLY AFFECT EVERY CIRCUIT COURT AND DISTRICT COURT NATIONWIDE.

The procedural issues that are squarely and cleanly raised by this petition for *certiorari* directly affect every circuit court and every district court nationwide. For purposes of sound judicial administration, it is critical that this Court intervene to establish a clear, uniform rule governing the proper relationship between the trial courts and the reviewing courts in terms of how a party may seek to vindicate a rightful claim of attorney-client privilege.

The issues raised in this case are especially important because they involve basic and systemic protection for the attorney-client privilege. It is well established in the Anglo-American legal system that the privilege is honored because it serves as an essential means to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389. Because it is "the oldest privilege protecting confidential communications," it "is also one of the most sacred and absolute." *Coleman v. American Broad. Co.*, 106 F.R.D. 201, 204 (D.D.C. 1985). Courts have commonly recognized that the wrongful disclosure of privileged materials causes irreparable harm and thus that specific procedural avenues must remain available to allow meaningful review of judicial orders that threaten to accomplish this unjust result. *See, e.g., In re Ford Motor Co.*, 110 F.3d at 963-64 (party would be "irremediably disadvantaged by erroneous disclosure" of privileged communications); *Harper & Row*, 423 F.2d at 492 (same);

Admiral Ins. Co., 881 F.2d at 1490-92 (granting mandamus relief to protect the attorney-client privilege because review was not available by any other means, since party may not immediately appeal a civil contempt order and irreparable harm can result from forced disclosure of privileged material). *Certiorari* review is warranted in this case to clarify the proper procedures that are to be followed by litigants and the lower federal courts in ensuring appropriate protection for the attorney-client privilege.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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October 31, 1997

APPENDICES

VALORIE LYNN GREAR, and husband
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON and
VERNBROOK, INC.,
Defendants.

No. 96-2417 GV

United States District Court
for the Western District of Tennessee
Western Division

July 7, 1997

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF TASK FORCE DOCUMENTS, DENYING DEFENDANT GENERAL MOTORS CORPORATION'S MOTION FOR PROTECTIVE ORDER, AND GRANTING PLAINTIFFS' MOTION TO COMPEL DISCOVERY

VESCOVO, U.S. Magistrate Judge:

Before the court are three discovery motions: (1) plaintiffs' Motion to Compel Production of Task Force Documents, (2) Defendant General Motors Corporation's Motion for Protective Order, and (3) plaintiffs' Motion to Compel Discovery. The motions were referred by District Judge Julia Smith Gibbons to the magistrate judge for determination.

This is an action for personal injuries arising out of an automobile accident that occurred on July 1, 1995. As alleged, plaintiff Valorie Grear was ejected from the driver's side of a 1995 Buick Skylark manufactured by defendant General Motors Corporation ("GM") immediately after colliding with another car. Plaintiffs have sued defendant GM on various theories of strict liability and tort based upon an allegedly defective design of the safety restraint and door-latching systems in GM automobiles. The safety restraint system in the Skylark included door-mounted seatbelts.

Two of the motions to be considered here, plaintiffs' Motion to Compel Production of Task Force Documents and Defendant General Motors' Motion for Protective Order, concern documents relating to GM's Automatic Restraint Task Force ("Task Force"). The Task Force was an internal group of GM engineers created in 1989. Very generally, the Task Force was formed to study the effectiveness of the existing design of door-mounted restraint systems and door-latching mechanisms on GM vehicles. The parties dispute whether the Task Force was created in anticipation of litigation.

On February 10, 1997, plaintiffs served their First Request for Production of Documents ("First Request for Production") on GM. Request No. 11 requested that GM "produce all documents relating to the meetings of and findings, conclusions, and studies of the Ad-Hoc Automatic Restraint Task Force, including, but not limited to, all handwritten notes, reports, studies and other memoranda." In Interrogatory No. 6 of plaintiffs' First Set of Interrogatories served February 7, 1997, plaintiffs requested a privilege log for all documents that GM had not produced either pursuant to initial Rule 26 disclosures or in response to the First Request for Production.

On March 11, 1997, GM submitted its responses to plaintiffs' First Request for Production and First Set of Interrogatories. GM objected to Request No. 11 on the grounds of the attorney-client privilege, work product doctrine, and self-critical analysis doctrine. GM's response made no effort, by privilege log or otherwise, to identify or describe the documents individually or by reasonable category.

As a result, on April 24, 1997, plaintiff filed the instant Motion to Compel Production of Task Force Documents. On April 25, 1997, GM countered by filing its own Motion for Protective Order, which sought to prevent disclosure of the Task Force documents on the basis of the above-mentioned privileges.[1]

On May 2, 1997, GM voluntarily produced to plaintiffs over six hundred documents which it identified as non-privileged Task Force documents.

On or about May 29, 1997, pursuant to the magistrate judge's instruction,[2] GM produced a privilege log identifying the remaining undisclosed Task Force documents. At the same time it produced the privilege log, GM unilaterally submitted a few selected Task Force documents to the magistrate judge for *in camera* inspection.

---

[1] On February 11, 1997, plaintiffs served GM with a Rule 30(b)(6) deposition notice. The notice instructed deponent in subparts 9 and 16 to bring certain Task Force documents to the deposition. GM's motion for protective order encompasses subparts 9 and 16 in the notice as well as Request #11.

[2] The magistrate judge discussed the status of the discovery dispute over the Task Force documents with counsel for both parties at a settlement conference held on May 23, 1997.

The third motion in question, plaintiff's Motion to Compel Discovery, filed May 6, 1997, seeks to compel production of documents and other materials regarding similar accidents, crash tests, lawsuits and complaints requested in plaintiffs' First Request for Production. GM objections to production on various grounds of irrelevance, burdensomeness and privilege.

The court will first consider the question of the Task Force documents and then treat plaintiffs' May 6, 1997 Motion to Compel Discovery.

I.

The threshold issue raised is whether defendant GM has waived its asserted privileges with respect to the Task Force documents for failure to properly and timely describe the documents. Fed.R.Civ.Proc. 26(b)(5) clearly provides:

> When any party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed.R.Civ.Proc. 26(b)(5). As the Comment to Rule 26 notes, to withhold discoverable material without proper notification "is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege

or protection." Fed.R.Civ.Proc. 26(b)(5) (Advisory Committee Notes, 1993 Amendments).

In this vein, a "blanket objection" to discovery on grounds of privilege grounds [sic] is clearly contrary to Rule 26. "Whether a responding party states a general objection to an entire discovery document on the basis of privilege, or generally asserts a privilege objection within an individual discovery response, the resulting "blanket objection" is decidedly improper. This fact should no longer be "news" to a responding party." *Eureka Financial Corp. v. Hartford Accident & Indemnity Co.*, 136 F.R.D. 179, 182 (E.D. Calif. 1991) (citations omitted).

Plaintiffs cite a recent unpublished ruling from a similar case in the Eastern District of Arkansas, *Baranowski v. General Motors, et al.*, Docket No. LR-C-96-222. In the *Baranowski*, case, plaintiff was ejected from a GM car following a collision. In her May 15, 1997 Memorandum and Order, United States District Judge Susan Webber Wright ordered GM to produce its Task Force documents, which are the same Task Force documents at issue in this case. Judge Wright found, in part, that GM waived any privilege claim on the Task Force documents by failing to make any reasonable effort to identify the documents. While the Memorandum and Order in *Baranowski* is not binding here, the court considers its ruling on the issue of waiver to be persuasive.

In this case, the Task Force documents are clearly relevant to plaintiffs' claims and thus "otherwise discoverable." Therefore, GM was required, under Rule 26(b)(5), to describe the documents it withheld as privileged. GM first failed to provide identifying information on the documents as part of its initial disclosures under Rule 26. GM then totally failed to include a privilege log, or a reasonable equivalent, in its responses to the request for production. Almost two months

later, GM produced a portion of the Task Force documents which it had previously withheld as privileged, yet it again failed to identify the other withheld documents to enable plaintiffs to assess the claims of privilege. Even after receiving Judge Wright's ruling which clearly communicated to defendants the requirements of a privilege log or equivalent description of withheld documents under Fed.R.Civ.Proc. 26(b)(5), GM still failed to produce a privilege log. The only reason GM finally produced a privilege log is that it was instructed to do so by the magistrate judge. GM offers no valid reason for not timely identifying the Task Force documents claimed as privileged. Instead, the court finds persistent delay by GM with respect to identification of these documents and, therefore, a willful disregard for the notification requirements of Rule 26.

These failures are not corrected by GM's submission of documents for *in camera* scrutiny by the court. *See* 8 Wright, Miller & Marcus, *Federal Practice and Procedure*: Civil 2d §2016.1 (2d ed. 1994). To the contrary, the magistrate judge specifically told counsel for GM she was not interested in conducting an *in camera* inspection of Task Force documents at this time and that such may not be necessary at all if an appropriate privilege log was filed and sufficiently described the withheld documents. The court has not reviewed the documents submitted for an *in camera* inspection and declines to do so.

Therefore, under these circumstances, this court finds that defendant GM's failure to list the Task Force documents or otherwise make a timely or reasonable effort to identify those documents in its Rule 26(a)(1) disclosures and in response to specific discovery requests resulted in a waiver of the claimed privileges. Accordingly, defendant GM is ordered to produce the Task Force documents requested in plaintiff's Request for Production No. 11.

For these reasons, plaintiffs' Motion to Compel Production of Task Force Documents is granted and defendant General Motors' Motion for Protective Order is denied. GM is directed to produce the Task Force documents by July 15, 1997.

II.

Plaintiffs' Motion to Compel Discovery of May 6, 1997, alleged GM's refusal to produce documents and other materials in response to the Requests No. 2, No. 3, No. 9 f., g, and j.-p., No. 10, and No. 20 in plaintiffs' First Request for Production.

Plaintiff reports in its reply brief that after the motion to compel was filed, GM agreed to produce the following documents in partial satisfaction of the disputed requests:

> 1) Reports concerning an accident that caused a front door to come open or door latch mechanism failure involving 1992-1997 N-car sedans (Pontiac Grand Am, Buick Skylarks, and Oldsmobile Calais);
>
> 2) Certain 1241 reports, CPIR's (Collision Performance Injury Reports) and other incident reports containing information relevant to door-mounted passive belt systems in 1992-1996 N-car sedans or mini-wedge door latches in 1990-1997 N-car sedans; and,
>
> 3) Copies of reports and videotapes of crash tests, if any are found, relating to door or latch openings on full scale crash tests of vehicles utilizing the mini-wedge latch.

Regarding the above documents which GM has agreed to produce, plaintiffs request that defendant be ordered to produce them immediately.

With respect to the rest of the disputed document requests, it appears that plaintiffs' motion can be effectively resolved by addressing three areas of discovery: CPIR documents, crash test documentation, and documentation for GM vehicles other than 1992-1997 N-car vehicles.

Plaintiffs' Requests No. 9 and 10 seek certain CPIR documents. According to the affidavit of plaintiffs' expert engineer, Ed Kerr, which was filed in support of this motion, it is feasible to produce CPIR's for "side door opening" events. In an effort to minimize the burden on GM, plaintiffs propose to limit CPIR's to "side door opening" events. Thus, defendant GM is ordered to produce CPIR's, as requested in the disputed discovery requests, to the extent of CPIR's created for "side door opening" events.

Plaintiffs' Request No. 3 requested video tapes of any crash tests in which the mini-wedge door locking system failed. Defendant complained that this was an unduly burdensome request because of the large number of video tapes to be reviewed. As an alternative to their original request, plaintiffs propose that the same information be retrieved from GM's crash test database. The court finds that plaintiffs' alternative request would be less burdensome. Thus, defendant GM is ordered to produce a report from its crash test database on all crash tests involving vehicles containing the mini-wedge latch, indicating the total count of such tests performed. The report must include as many pieces of information that the database contains with respect to each crash test, including whether exterior doors remained closed and/or latched.

Finally, GM argues that plaintiffs' discovery should be restricted to documentation of failed door-mounted restraint systems on N-car sedans manufactured in 1992 through 1996. The court finds that documents indicating a failure or defect of the same safety restraint system and mini-wedge door latch involved in this case are relevant and discoverable whether it was in an N-car or other GM vehicle. GM's brief states that the mini-wedge latch has been used in GM cars dating from the 1990 model year. The court therefore orders defendant GM to produce the pertinent information sought as to lawsuits, complaints, reports and tests in Requests No. 2 and 3, to the extent such information has not already been produced, for all GM vehicles manufactured since the 1990 model year, not limited to N-cars.

For the above reasons, plaintiff's Motion to Compel Discovery is granted. GM is directed to produce the documents indicated in this order by July 15, 1997.

IT IS SO ORDERED.

_____
DIANE K. VESCOVO
U.S. MAGISTRATE JUDGE

DATE:_____

VALORIE LYNN GREAR and husband,
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.

No. 96-2417-G/V

United States District Court
for the Western District of Tennessee
Western Division

August 1, 1997

GIBBONS, District Judge:

Before the court are defendant General Motors Corporation's objections to the order of the United States Magistrate Judge entered July 8, 1997. The court has reviewed defendant's objections, plaintiffs' response and the entire record pertaining to this matter. The magistrate judge's ruling is not clearly erroneous or contrary to law. It is therefore affirmed. Defendant is ordered to produce all of the documents covered by the order, no later than August 8, 1997.

IT IS SO ORDERED.

_____
JULIA SMITH GIBBONS
U.S. DISTRICT JUDGE

_____
DATE

VALORIE LYNN GREAR, and husband
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON, and
VERNBROOK, INC.,
Defendants.

No. 96-2417-G

United States District Court
for the Western District of Tennessee
Western Division

August 8, 1997

ORDER DENYING STAY AND
EXTENDING TIME FOR DOCUMENT PRODUCTION

GIBBONS, District Judge:

Before the court is defendant General Motors Corporation's motion for emergency stay of this court's August 1, 1997 order. The court denies the motion for stay. Any stay of this court's order will have to be obtained from the United States Court of Appeals for the Sixth Circuit. The court will extend the time for production of the documents covered by its order until August 15, 1997.

IT IS SO ORDERED.

_____
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

_____
DATE

VALORIE LYNN GREAR, and husband,
PAUL C. HORDBERG,
Plaintiffs-Appellees,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant,
CAROL R. VERNON; VERNBROOK, INC.
Defendants.

No. 97-5968

IN RE GENERAL MOTORS CORPORATION,
Petitioner.

No. 97-5989

United States Court of Appeals
for the Sixth Circuit

August 13, 1997

ORDER

ENTERED BY ORDER OF THE COURT:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product privilege. The district court found that GM waived any privilege it may have had and ordered the document produced by August 8, 1997. GM filed a notice of appeal from the ruling (Case No. 97-5968) and also petitions this court for a writ of mandamus (Case No.

97-5989). GM seeks a stay of the order directing production pending a determination of the appeal and the petition for a writ of mandamus. The district court denied GM's motion for a stay pending appeal, but extended the time for production of the document to August 15, 1997. GM also seeks leave to file a copy of the document under seal in this court.

Due to the exigent nature of the relief requested, this matter is being initially referred to a single judge of the court. *See* Fed. R. App. P. 8A(a). The production of the document by GM will be stayed temporarily to permit consideration of the issues raised by a three-judge panel of the court. The plaintiffs are directed to file a response to the emergency motion for a stay and to the petition for a writ of mandamus by August 22, 1997. The court's appellate jurisdiction should also be addressed by the plaintiffs.

It therefore is ORDERED that the order directing GM to produce the ten-page memorandum is stayed pending further order of the court. GM's motion to file a copy of the document under seal is granted.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

VALORIE LYNN GREAR, and husband,
PAUL C. HORDBERG,
Plaintiffs-Appellees,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant,
CAROL R. VERNON; VERNBROOK, INC.
Defendants.

No. 97-5968

United States Court of Appeals
for the Sixth Circuit

September 17, 1997

ORDER

KENNEDY, GUY, and SILER, Circuit Judges:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product doctrine. The district court found that GM waived any privilege it may have had and ordered the document produced. GM filed this appeal form the discovery ruling and also sought review in mandamus. GM moved for a stay of the production of the document pending its appeal and pending consideration of the petition for a writ of mandamus. On August 13, 1997, the court granted a temporary stay of production to facilitate consideration of the issues by a three-judge panel of the court. The matter is before the court to consider the plaintiffs' motion to dismiss the

appeal for lack of jurisdiction and GM's motion for a stay pending appeal. GM opposes the motion to dismiss; the plaintiffs oppose the motion for stay.

This court has jurisdiction of appeals from final orders of the district court. 28 U.S.C. § 1291. The district court's discovery ruling is not the final district court order in this litigation. GM maintains, however, that the ruling should be appealable as a collateral order. This court has consistently held that "orders denying or granting discovery are not appealable under the collateral order doctrine." *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992); *see Federal Deposit Ins. Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990); *Dow Chemical Co. v. Taylor*, 519 F.2d 352, 354-55 (6th Cir. 1975). If a party seeks an immediate appeal of the matter, the party should submit to contempt and then appeal the contempt ruling. *See United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (order). Although the Third Circuit recently concluded in *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), that a district court ruling ordering production of documents claimed to be privileged under the attorney-client and work-product doctrine was an appealable collateral order, we decline to adopt the reasoning of that case.

It therefore is ORDERED that the motion to dismiss is granted. The temporary stay issued by the court on August 13, 1997, is dissolved. GM's motion for a stay of the production of the document pending appeal is denied as moot.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN RE GENERAL MOTORS CORPORATION,
Petitioner.

No. 97-5989

United States Court of Appeals
for the Sixth Circuit

September 17, 1997

ORDER

KENNEDY, GUY, and SILER, Circuit Judges:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product doctrine. The district court found that GM waived any privilege it may have had and ordered the document produced. GM petitions for a writ of mandamus directing the district court to vacate the order requiring production of the document. GM moved for a stay of production pending consideration of its mandamus petition and of its appeal from the order. On August 13, 1997, the court issued a temporary stay of the district court's ruling. The plaintiffs oppose the petition for a writ of mandamus and the motion for a stay.

A party seeking mandamus must have no other means of obtaining the relief he desires and must demonstrate a "clear and indisputable" right to that relief. *Kerr v. United States District Court*, 426 U.S. 364, 402 (1976). GM argues that a direct appeal of the privilege issue following disclosure of document and entry of final judgment is inadequate. Although a direct appeal following final judgment is an inadequate

remedy, GM can obtain appellate review by submitting to contempt and appealing the contempt ruling. *See United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (order); *Dow Chemical Co. v. Taylor*, 519 F.2d 352, 354-55 (6th Cir. 1975).

It therefore is ORDERED that the petition for a writ of mandamus is denied. The August 13, 1997, temporary stay is dissolved, and the motion for stay pending review is denied as moot.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

VALORIE LYNN GREAR, and husband,
PAUL C. HORDBERG,
Plaintiffs-Appellees,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant,
CAROL R. VERNON; VERNBROOK, INC.,
Defendants.
IN RE GENERAL MOTORS CORPORATION,
Petitioner.

Nos. 97-5968 & 97-5989

United States Court of Appeals
for the Sixth Circuit

October 13, 1997

ORDER

KENNEDY, GUY, and SILER, Circuit Judges:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product doctrine. GM filed an appeal from the discovery ruling and also sought review in mandamus. On September 17, 1997, the court dismissed the appeal for lack of jurisdiction and denied the petition for writ of mandamus.

GM now seeks an emergency stay of the mandate for thirty days to permit the filing of a petition for writ of certiorari in the Supreme Court. In addition, GM seeks a stay of the

production of the document pending review by the Supreme Court. We conclude that the issuance of the mandate should be stayed for thirty days. *See* Sixth Circuit Rule 15. In addition, we will stay the production of the disputed document for a thirty-day period to permit GM to file a motion for a stay in the Supreme Court. If such a motion is filed, the stay will continue until the Supreme Court disposes of the stay motion.

It therefore is ORDERED that the mandate is stay [sic] for a period of thirty-days in order to permit the filing of a petition for writ of certiorari. The production of the document by GM is stayed for thirty days to permit the filing of a motion for a stay in the Supreme Court. If a stay motion is filed within thirty days, the production of the document will be stayed pending the disposition of the motion for a stay by the Supreme Court.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

VALORIE LYNN GREAR, and husband,
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON, and
VERNBROOK, INC.
Defendants.

No. 96-2417-G

United States District Court
for the Western District of Tennessee
Western Division

May 14, 1997 (Submitted)
May 15, 1997 (Filed)

SUBMISSION OF AFFIDAVIT OF JAMES A. DURKIN

COMES NOW, General Motors Corporation ("GM") and submits the attached Affidavit of James A. Durkin in support of Defendant General Motors Corporation's Motion for Protective Order in the above-referenced case.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
GENERAL MOTORS CORP.

CERTIFICATE OF SERVICE

This is to certify that a true and correct of the foregoing document has been forwarded via certified mail, return receipt requested to all counsel of record on this 14th day of May, 1997.

_____
ROSS T. ROBINSON

VALORIE LYNN GREAR, and husband,
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON, and
VERNBROOK, INC.
Defendants.

No. 96-2417-G

United States District Court
Western District of Tennessee
Western Division

May 13, 1997

AFFIDAVIT OF JAMES A. DURKIN

I, JAMES A. DURKIN, after first being duly sworn, state the following in support of General Motors' claims of privilege as related to its production of documents in this litigation.

1. I give this affidavit in support of General Motors Corporation's claims of privilege over documents that should be exempted from production. I have personal knowledge of the matters stated herein and am competent to testify thereto.

2. I am an attorney licensed to practice law in the State of Michigan and am currently a member of the General Motors Corporation ("GM") Legal Staff. I have been a member of GM Legal Staff since 1965.

3. From May 1987 to July 1990, I served as the legal advisor to General Motors' General Technical Committee (GTC). In that position, I provided members of the GTC with legal advice and related information to assist Committee members in making decisions in the performance of their Committee and corporate duties.

December 12, 1989 Memorandum:

4. On November 17, 1989, at a meeting of the GTC, I made a request for technical assistance in anticipation of litigation against General Motors regarding door-mounted restraint systems. More specifically, I sought the assistance of knowledgeable engineers to support Legal Staff in its effort to provide legal advice to GM regarding the defensibility of its passive restraint systems and the potential for claims alleging defects in such systems as installed in variety of GM vehicles. To further GM's defense efforts in these cases, and to facilitate the rendition of professional legal services to General Motors, I concluded that I, as well as other members of the Legal Staff, needed assistance that could be provided by knowledgeable GM engineers.

5. My request for assistance was initially made orally to the GTC and then communicated in writing in a confidential December 12, 1989 memo from me to Edward W. Hufnagle, the Chairman of the GTC's Body Subcommittee, and Albert R. Bernat and John G. Haviland, the Co-Chairmen of the GTC's Occupant Protection Safety System Subcommittee. (*See* December 12, 1989 memorandum at Bates Nos. 002783-84). Each of these three persons had the authority, within the scope of his duties as a GM employee, to identify and assign GM engineers and other GM employees to provide assistance to me and other members of the Legal Staff as requested.

6. My December 12 memo was copied to certain members of the GTC, including Ronald H. Haas, Arvin F. Mueller, Donald J. Runkle, Thomas J. Davis, Robert L. Dorn, Roger W. Masch and to certain GM Legal Staff attorneys, including Harry J. Pearce, GM's General Counsel, George F. Ball, Douglas E. Brown, Dennis R. Minano and Gary Toth. My memorandum was so distributed because it was my belief that each of these individuals needed to be aware of the assistance I was seeking, both to accommodate the new time demands that would be placed on task force engineers and to benefit from the information that would be gained. I anticipated that my memorandum would remain "privileged and confidential" and labeled it accordingly.

7. In my December 12 memo, I specifically advised the addressees that all work done pursuant to my request for assistance should be considered "confidential" and protected by the attorney-client privilege and the attorney work-product exemption. I further advised the addressees that the records or reports generated by any advising engineer should be treated as confidential and communicated only to the attorneys responsible for providing GM with advice or defending GM in related litigation.

8. As the result of my request for technical assistance, the Automatic Restraint Task Force (the "Task Force") was created. Robert Sinke served as the Task Force Chairman and Gary Toth, a member of GM Legal Staff, served as one of the Task Force's principal legal advisors. The Task Force consisted of approximately ten General Motors engineers.

9. The purpose of the Task Force was to provide the Legal Staff with information and engineering evaluations on the technical issues raised in connection with anticipated litigation against General Motors. As noted above, the purpose

of these communications was to enable me and other members of the Legal Staff to provide legal advice to General Motors and to prepare for the defense of anticipated litigation.

April 23, 1990 Memorandum:

10. In connection with my continuing role as legal advisor to the General Technical Committee, I asked Gary Toth and Doug Brown, both members of GM's Legal Staff, to prepare a memorandum analyzing available technical information related to the use of automatic belt systems.

11. Pursuant to my request, Mr. Toth and Mr. Brown prepared a memorandum on the requested issues which contained their thoughts and mental impressions as attorneys representing the interests of General Motors. The memorandum was prepared with the anticipation that it would remain confidential and be used solely to provide legal advice to the GTC and to defend litigation claims against General Motors. A copy of Mr. Toth and Mr. Brown's memorandum, including all attachments, can be found at Bates Nos. 284034-50.

12. To properly advise the GTC, I concluded that it was important that certain GTC members understand the potential legal implications of the comparative analyses contained in the confidential memorandum. I therefore forwarded a copy of the confidential memorandum to certain members of the GTC, including Donald L. Runkle, a GM Vice-President and Chairman of the GTC; Ronald H. Haas, a GM Vice-President in Current Engineering and Betsy Ancker-Johnson, a GM Vice-President in Environmental Activities. I also forwarded a copy of the memorandum to Albert R. Bernat and John G. Haviland, Co-Chairmen of the GTC's Occupant Protection Safety System Subcommittee, and Robert A. Rogers, Director of Automotive Safety Engineering, who had general oversight responsibility on safety matters. Finally, a

copy of the memorandum was forwarded to Robert A. Sinke, the Chairman of the Automatic Restraint Task Force. A copy of my memorandum directing this distribution can be found at Bates No. 284033.

13. The confidential memorandum was circulated to these individuals for the purpose of providing them with the underlying analysis for the legal advice I had provided to them in their respective capacities in connection with the GTC, the senior technical committee that was responsible for advising the Corporation on technical issues. The memorandum was forwarded with the expectation that it would be kept confidential and used by these persons only in connection with the implementation of legal advice or in the defense of General Motors in anticipated litigation.

14. A true and correct copy of each of the documents referenced in this affidavit will be provided to the Court for *in camera* review.

FURTHER AFFIANT SAYETH NOT.

_____

James A. Durkin

Subscribed and sworn to before me this ____ day of _____, 1997.

_____

Notary Pubic

(2)

Supreme Court, U.S.
FILED
FEB 5 1998
CLERK

No. 97-746

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,

Petitioner,

v.

VALORIE LYNN GREAR AND PAUL C. NORDBERG,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondents respectfully submit this response in opposition to the Petition for a Writ of Certiorari and the Supplemental Brief for Petitioner filed by General Motors Corporation ("General Motors"). Contrary to the assertions in General Motors' petition, the rulings of the Sixth Circuit Court of Appeals at issue in this matter do not foreclose all avenues of review of a district court's order compelling disclosure of allegedly privileged documents. The Sixth Circuit, in line with the majority of other circuit courts of appeal, allows mandamus review of discovery orders involving a claim of privilege in

appropriate cases that meet the high standard for granting such extraordinary relief. The Sixth Circuit denied General Motors' petition for writ of mandamus not on jurisdictional grounds but rather because it did not meet the well-established standard for review of such petitions. Under these circumstances, as discussed more fully below, General Motors' Petition for Writ of Certiorari fails to present issues appropriate for review by this Court and should be denied.

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 26(a)(1) provides in relevant part:

> **(1) Initial Disclosures.** ...[A] party shall, without awaiting a discovery request, provide to other parties:
>
> ...
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.

Federal Rule of Civil Procedure 26(b)(5) provides:

> **(5) Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these

> rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

STATEMENT OF THE CASE

Respondents present this brief factual statement in order to clarify the circumstances leading to the decisions of the magistrate and district judges and the Sixth Circuit that are at issue in the petition filed by General Motors.

Respondents Valorie Grear and her husband filed this lawsuit in 1996, alleging that the serious injuries that Ms. Grear suffered as a result of a 1995 accident in a General Motors vehicle resulted from the defective design of the car's door-mounted passive restraint and door lock systems. At the time that Respondents filed their lawsuit, an internal General Motors Automatic Restraint Task Force ("Task Force") had studied General Motors' door-mounted restraint systems. Respondents were not aware of the Task Force or of the documents related to its work, including a 1990 "Task Force Memorandum" prepared by members of the Task Force. According to General Motors, the memorandum, which is at the core of this petition, was prepared for the purpose of "analyzing available technical information related to the use of automatic belt systems." (Pet. at 3).

Despite the undisputed relevance to Respondents' claims of the Task Force Memorandum and other Task Force documents, General Motors failed to disclose them in its initial disclosures as mandated by Federal Rule of Civil Procedure 26(a)(1) or to claim them as privileged and describe them as required by Rule 26(b)(5). When Respondents later learned of the existence of the Task Force from another source, Respondents submitted document requests to General Motors that specifically requested all Task Force documents. Respondents also propounded an interrogatory requesting a privilege log for all documents that General Motors had withheld on a claim of privilege.

In response to Respondent's discovery requests, General Motors objected to the production of the Task Force documents as privileged but did not produce the privilege log as requested or identify the withheld documents in any manner. When respondents filed a motion to compel production of the Task Force documents, General Motors still did not produce the documents, including the Task Force Memorandum, or comply with Rule 26(b)(5), which requires that documents withheld on a claim of privilege be identified "in a manner that ... will enable other parties to assess the applicability of the privilege or protection." At most, General Motors filed an affidavit describing the Task Force but not the hundreds of documents it claimed were privileged. (Pet. App. 22a). Only after the magistrate judge instructed General Motors to produce a privilege log did General Motors provide any information to Respondents that identified the documents that it was withholding as privileged. Although General Motors submitted the Task Force Memorandum to the magistrate judge to review in camera, the magistrate judge found that the ex parte submission of the withheld documents to the court did not satisfy the Rule 26(b)(5) requirement that General Motors describe the

documents so that the other party could assess the applicability of the privilege. (Pet. App. 6a).

In light of this conduct on the part of General Motors, the magistrate judge held that General Motors had waived its right to claim that the Task Force Memorandum was privileged. (Pet. App. 6a). In so holding, the magistrate judge followed the Advisory Committee Notes to the 1993 Amendments to Rule 26, which state that the withholding of otherwise discoverable materials without proper notification and identification "may be viewed as a waiver of the privilege." (Pet. App. 4a-5a). The district court affirmed the magistrate's order following an independent review of the record and the magistrate's findings. (Pet. App. 10a).

General Motors immediately appealed the district court's ruling to the Sixth Circuit Court of Appeals and also petitioned the Sixth Circuit for a writ of mandamus. Respondents moved to dismiss the appeal on jurisdictional grounds and filed a response in opposition to the mandamus petition. In separate orders dated September 17, 1997, the Sixth Circuit dismissed the appeal and denied the mandamus petition. (Pet. App. 14a-15a, 16a-17a). The Sixth Circuit ruled that it did not have jurisdiction of the appeal as either a final order under 28 U.S.C. § 1291 or as a "collateral order." (Pet. App. 15a). The court also ruled that General Motors' petition did not meet the standard for mandamus in that other means of obtaining relief existed, namely that General Motors could "obtain appellate review by submitting to contempt and appealing the contempt ruling." (Pet. App. 16a-17a).

General Motors then filed its petition for certiorari and application for stay with this Court. When this Court denied the stay application, General Motors finally produced the Task Force Memorandum to Respondents. Respondents waived the filing of

a response to the petition for certiorari and now submit this response as requested by the Court.

SUMMARY OF ARGUMENT

General Motors' petition asks the Court to grant certiorari in order to consider the proper mechanism for a party to assert an immediate challenge in the courts of appeal of a district court order compelling the disclosure of allegedly privileged documents. General Motors bases its petition on two rulings by the Sixth Circuit that, General Motors claims, dismissed both its appeal and its writ of mandamus on jurisdictional grounds.

Respondents respectfully disagree with the fundamental premise asserted by General Motors that the Sixth Circuit has imposed a rigid, jurisdictional bar to the interlocutory review of any discovery ruling involving a claim of attorney-client privilege. The Sixth Circuit, like all other courts of appeal except the Third Circuit, holds that discovery orders are not appealable as of right but may be considered on a petition for writ of mandamus under appropriate circumstances. The alleged jurisdictional bar to mandamus review in the Sixth Circuit simply does not exist, as specifically demonstrated by the recent Sixth Circuit opinion in In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997), in which the court granted mandamus review of a district court order compelling production of a corporate report withheld on a claim of privilege.

Unlike the important question of law presented by the Perrigo petition, the issue underlying General Motors' petition for writ of mandamus is the decision by the district court, acting within its broad discretion to control discovery, that General Motors waived its claim of privilege as a result of its discovery

abuses. Based upon these circumstances, the Sixth Circuit ruled that General Motors' petition did not merit mandamus review.

Likewise, General Motors' petition for writ of certiorari does not present special and important questions of federal law that warrant review by this Court. A means of reviewing district court decisions regarding the production of documents purported to be privileged is available in every circuit. That the Sixth Circuit did not deem General Motors' mandamus petition adequate for review does not create an issue of significance to the administration of justice in the federal courts.

ARGUMENT

General Motors contends that its petition for writ of certiorari "cleanly presents a basic procedural issue ... on which there is a clear and irreconcilable three-way split among the circuit courts of appeals." (Pet. 6-7). This assertion is incorrect as to both issues presented for review by General Motors.

First, there is not a three-way split as to the issue of whether a discovery order, even one involving a claim of attorney-client privilege, is immediately appealable under the collateral order doctrine. In fact, every circuit identified by General Motors except one agrees that discovery orders are not appealable as collateral orders. See cases cited at Pet. 10-11. Only the Third Circuit in In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997), holds otherwise. The Sixth Circuit joins with the majority in concluding that this Court's decision in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), does not compel appellate review of discovery orders. See Federal Deposit Ins. Corp. v. Ernst & Whinney, 921 F.2d 83, 85 (6th Cir. 1990); Dow Chem. Co. v. Taylor, 519 F.2d 352, 354-55 (6th Cir.), cert. denied, 423 U.S. 1033 (1975). The reason for this

conclusion is well founded. As the Sixth Circuit has explained, to allow appellate review of discovery orders "would '... invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters.'" Dow, 519 F.2d at 354 (citations omitted).

Second, the Sixth Circuit has not held that it is without jurisdiction to review on mandamus a discovery order involving a claim of attorney-client privilege. Indeed, in a published opinion decided after the denial of General Motor's petition, In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997), the Sixth Circuit specifically addressed this issue and held that the petition in that case met the standard for mandamus review of an order compelling the production of a corporate report withheld on a claim of privilege. (Id. at 437). As noted by the Perrigo court, the Sixth Circuit has traditionally held that mandamus is available to review "'questions of unusual importance necessary to the economical and efficient administration of justice,'" or "important questions of first impression." Id. at 435 (quoting EEOC v. K-Mart Corp., 694 F.2d 1055, 1061 (6th Cir. 1982)). The court reiterated its preference for "a 'flexible' rather than a 'rigid' approach" in deciding which cases merit mandamus review in order to preserve the availability of the writ in extraordinary situations. Id. (quoting In re Chimenti, 79 F.3d 534, 539 (6th Cir. 1996)).

In order to determine which cases warrant mandamus review, the Sixth Circuit balances the following five factors:

1. The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.

> 2. The petitioner will be damaged or prejudiced in a way not correctable on appeal. . ..
>
> 3. The district court's order is clearly erroneous as a matter of law.
>
> 4. The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> 5. The district court's order raises new and important problems, or issues of law of first impression.

Id. (quoting Chimenti, 79 F.3d at 540 and In re Bendectin Products Liability Litigation, 749 F.2d 300, 304 (6th Cir. 1984)). These factors are the same as or similar to those considered by all other circuits in the more recent decisions cited by General Motors, with the exception only of the Third Circuit in its In re Ford decision. See In re Regents of Univ. of Cal., 101 F.3d 1386, 1388 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 1484 (1997); In re Bieter Co., 16 F.3d 929, 932 (8th Cir. 1994); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 163 (2d Cir. 1992); Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1490-92 (9th Cir. 1989); In re Burlington Northern, Inc., 882 F.2d 518, 523 (5th Cir. 1987), cert. denied, 484 U.S. 1007 1988). None of these courts grants automatic mandamus review of discovery orders requiring disclosure of allegedly privileged documents; rather, each requires that the issue presented turn on an important question of law, not a mere discretionary decision of the lower court. See also Boughton v. Cotter Corp., 10 F.3d 746, 751 (10th Cir. 1993) (denying mandamus petition because rulings on privilege, even if wrong, were not clear abuse of discretion).

General Motor's petition for writ of mandamus simply did not meet this standard. The district court in this case exercised its discretion under Rule 26 to control discovery and to ensure compliance by the parties with the procedures established by the federal rules. The district court's determination that General Motors waived its right to claim privilege as to the Task Force Memorandum did not turn on the court's importing a "rigid," "extratextual requirement to create a privilege log into Rule 26," as General Motors erroneously contends (Pet. 13), but rather on the facts of General Motors' own conduct in willfully disregarding the requirements of Rule 26. As the magistrate judge stated:

> Therefore, under these circumstances, this court finds that defendant GM's failure to list the Task Force documents or otherwise make a timely or reasonable effort to identify those documents in its Rule 26(a)(1) disclosures and in response to specific discovery requests resulted in a waiver of the claimed privileges.

(Pet. App. at 6a). General Motors' representation to this Court that "it is plain that General Motors complied with the absolute letter and spirit of this Rule [26]" is directly contradicted by the magistrate judge's finding that General Motors exhibited "persistent delay" in identifying privileged documents and "willful disregard for the notification requirements of Rule 26." (Pet. App. 6a).

Notably, this is not the first time that a district court has sanctioned General Motors for refusing to identify the Task Force documents in compliance with Rule 26. In Maxey v. General Motors, No. 3:95cv6-D-A, 1996 WL 692222 (N.D. Miss. Nov. 18, 1996), the district court affirmed the ruling of the magistrate judge that General Motors waived its right to assert its

claim of privilege as to the Task Force Memorandum by failing to identify the document as required by Rule 26(b)(5). (Brief App. 8a-10a). As in the present case, General Motors sought mandamus review of the district court order, and the Eighth Circuit, like the Sixth Circuit, denied the mandamus petition. See Maxey v. General Motors, No. 3:95cv6-D-A, 1997 WL 88214 (N.D. Miss. Jan. 10, 1997) (Brief App. 13a).

Likewise, the district court in Baranowski v. General Motors, No. LR-C-96-222 (E.D. Ark. May 15, 1997), held that General Motors waived its claim of privilege as to the Task Force Memorandum by failing to comply with the requirements of Rule 26. (Brief App. 21a). The Baranowski case settled prior to a ruling by the Eighth Circuit on General Motor's petition for writ of Mandamus.

As these cases show, General Motors was clearly on notice by the time of the magistrate's ruling in this case that its refusal to identify the Task Force documents would result in the waiver of its claim of privilege. Given all of the circumstances in this matter, the district court's finding of waiver was not a clear abuse of discretion.

As a result, the Sixth Circuit recognized that General Motors' mandamus petition did not meet the standard that "[a] party seeking mandamus must have no other means of obtaining the relief he desires and must demonstrate a 'clear and indisputable' right to that relief." (Pet. App. 16a (citing Kerr v. United States District Court, 426 U.S. 394, 402 (1976)). The court denied the mandamus petition in this case because it found that General Motors had an adequate remedy other than mandamus; it could refuse to comply with the district court's order, submit to contempt and then appeal the contempt ruling. This was not a dismissal on jurisdictional grounds, as General

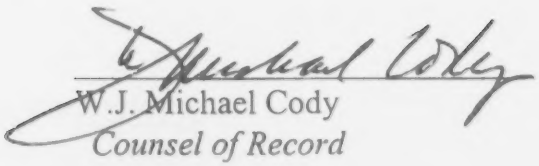
Motors now asserts, but a denial of the petition because General Motors failed to present an issue that warranted mandamus relief.

General Motors' petition for writ of certiorari thus fails to raise an issue of importance to the administration of justice in the federal courts and should therefore be denied.

CONCLUSION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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Attorneys for Respondent

February 5, 1998

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ARCHIE MAXEY, PLAINTIFF

v. Civil Action No. 3:95cv6-D-A

GENERAL MOTORS CORPORATION DEFENDANT

MEMORANDUM OPINION

By order dated September 19, 1996, United States Magistrate Judge S. Allan Alexander denied as untimely the defendant's motion for a protective order so that it would be relieved of the obligation to produce certain documents to the plaintiff in discovery. Maxey v. General Motors Corp., Civil Action No. 3:95cv6-D-A (N.D. Miss. Sep. 19, 1996) (Alexander, M.J.) (Order Denying Motion for Protective Order). On September 27, 1996, the defendant filed an appeal of this order of the Magistrate Judge. The plaintiff responded to this filing on October 17, 1996, and also moved to strike the appeal or, in the alternative, to dismiss the appeal. After having considered the order of the Magistrate Judge and the submissions of the parties, the undersigned is of the opinion that the order is neither clearly erroneous nor contrary to law. The undersigned shall not modify or set aside Judge Alexander's order of September 19, 1996.

The crux of the defendant's original motion before the Magistrate Judge was that the documents which the plaintiff sought produced and the defendant sought protected were protected by the attorney-client and "self-critical analysis" privileges. The Magistrate Judge never reached the actual

question of whether or not the documents were in fact protected by these privileges, however, but rather denied the motion for two particular reasons: 1) the motion itself was untimely; and 2) the claims of privilege asserted for these documents were untimely.

I. DISCUSSION

A. Appeal or Objection?

The plaintiff's first ground in opposition to this court's consideration of the matter at hand is the argument that there is no mechanism within the Federal Rules of Civil Procedure for the defendant to "appeal" the order of the Magistrate Judge to the undersigned. Rather, the only proper review of the Magistrate Judge's order by this court would be pursuant to Fed.R.Civ.P. 72(a) by the filing of "objections" to the order within ten days of its entry. Fed.R.Civ.P. 72(a). The plaintiff is correct that this court's review of the Magistrate Judge's order is pursuant to that rule, and this court will only modify or set aside that order if it is "clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a). That the defendant styled its pleading in this matter as an "appeal" is a mere semantical distinction, for it did otherwise properly and timely file its objections. This fact alone does not present sufficient reason for this court to strike the defendant's pleading or refuse consideration of it.

B. TIMELINESS OF THE MOTION

1. Generally

While the express language of Fed.R.Civ.P. 26 does not set limits within which a motion for protective order must be made,

there is an implicit requirement that the motion be timely, or seasonable. See, e.g., Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C.1991); Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 487 (D.N.J.1990);. See also, Wright & Miller, 8 Federal Practice and Procedure, § 2035 (2nd Ed. 1994). A motion for protective order is timely if made prior to the date set for the discovery. See, e.g., Wang v. Hsu, 919 F.2d 130, 131 (lOth Cir.1990); Brittain, 136 F.R.D. at 413; United States v. International Business Machines, 70 F.R.D. 700, 701 (S.D.N.Y.1976) ("Such motions under Rule 26(c) must be served before the date set for production."); Hon. David Hittner, Federal Civil Procedure Before Trial, p. 11-35 ("A motion for protective order should be noticed at the earliest possible time and certainly before the discovery procedure is to occur."). In this case, the defendant's motion for a protective order was filed after its deadline to respond to the plaintiff's request for production of documents, and was therefore untimely as it was not made prior to the deadline for the discovery in question.

Further, the defendant can find no solace in pointing the finger back at the plaintiff for his failure to present the issue to the court via a Motion to Compel or for some type of conference with the court. A timely motion for a protective order by the party seeking relief from the obligation to comply with a discovery request is the best manner in which to have privileged documents shielded from the discovery process.

Defendant argues, that for written discovery, it is sufficient that it note its objections within the time permitted, and that it should not have to move for a protective order until after the plaintiffs move to compel the discovery. Nothing in Rule 26 suggests that there should be such a dichotomy between oral depositions and written discovery. The procedure turns the

normal state of obligations on its head. The party seeking the protective order, who has the burden of requesting and supporting it, should also be responsible for initiating the process. Permitting that party to merely note its objections and then sit back and wait for a motion to compel can only serve to prolong and exacerbate discovery disputes. Brittain, 136 F.R.D. at 413 (emphasis added); but see Wright & Miller, 8 Federal Practice and Procedure § 2035, p. 481 ("A party may not remain completely silent when it regards discovery as improper. If it desires not to ... respond, it must object properly or seek a protective order ... "). This court agrees with the court in Brittain, and the defendant should have brought this matter to the attention of the court before the time expired for his response to the plaintiff's request for production. As the defendant is the party seeking to protect the documents from disclosure in this case, it should not be allowed to sit back and force the plaintiff to take the initiative to file a Motion to Compel with this court.

The Magistrate Judge was not required to deny outright the defendant's motion as untimely, however. If the defendant can demonstrate good cause for its failure to timely file, a meritorious motion for protective order may nevertheless be granted. Brittain, 136 F.R.D. at 414; Wright & Miller, 8 Federal Practice and Procedure § 2035, p. 478 ("[T]he courts still consider the timeliness of a motion and look to all of the circumstances in determining whether the motion is untimely."). While the Magistrate Judge had the discretion to deny the defendant's motion as untimely in this case, the defendant was entitled to the opportunity to demonstrate good cause in explanation of its failure to timely file. It is not clear from the Magistrate Judge's order that she employed this standard or considered in this particular context any proffered explanation of the defendant for its failure to timely file a motion for protective

order. Were this the only justification for denying the defendant's motion as untimely, the undersigned would return this matter to the Magistrate Judge for a determination of the defendant's proffered "good cause" for its failure to timely file. As noted below, however, the Magistrate Judge had more than one sufficient reason to deny the motion.

2. Timeliness of the motion in light of the Uniform Plan

The Magistrate Judge did not, however, address the "timeliness" issue as it has thus far been discussed by this court. Rather, she determined that the motion was untimely with respect to a provision of this court's Uniform Plan for the implementation of the Civil Justice Reform Act of 1990. 28 U.S.C. § 471 et seq. Magistrate Judge Alexander noted that the defendant filed its motion for protective order with the court on August 26, 1996, two days before the expiration of the discovery deadline. When considering the time allowed for briefing under Local Rule 8(d), the Magistrate Judge reasoned, there was no practical way for the matter to be resolved prior to the expiration of the discovery deadline. See Uniform Civil Justice Expense and Delay Reduction Plan (hereinafter "Uniform Plan"), Section Four (II)(A) ("All discovery motions must be filed so that they do not affect the discovery deadline."). The Magistrate Judge further stated in her order:

> To exacerbate matters, defendant stated in its motion that it "desires to supplement this motion with the deposition testimony of Robert Sinke after that transcript is received ... in order that this Court can fully understand the issues raised in this motion." Defendant then waited until September 6, 1996-nine days after expiration of

> the discovery deadline--to serve its proposed "supplement." Aside from the fact that supplementation of this sort is not contemplated anywhere in the local rules that govern this court, defendant used its supplementation not only to produce the deposition of Mr. Sinke, but also to cite new cases and make new legal arguments not expressly included in its August 26, 1996 motion. Defendant will not be allowed to circumvent the discovery deadline in this fashion.

Maxey, (Order Denying Motion for Protective Order, p. 2).

The undersigned notes that the defendant itself acknowledges that the documents it seeks to protect would otherwise be responsive to a request for production of documents propounded by the plaintiff on July 24, 1996. Understandably, some time would have been required to make a good faith attempt at resolution of this matter prior to seeking a protective order from the court. Fed.R.Civ.P. 26(c). Nevertheless, the purpose of Section Four (II)(A) is to facilitate the expedient resolution of litigation by preventing unnecessary extensions of the discovery period. Having all discovery disputes before the court prior to the expiration of the discovery period enables this court to resolve those disputes quickly and hopefully permit the parties to conduct any "follow up" discovery which results from the disputed discovery within the pre-established discovery period.

From the facts that have been presented to this court, the defendant should have been aware of the need for a protective order in sufficient time for it to file its motion in compliance with both Fed.R.Civ.P. 26(c) as well as Section Four (II)(A) of the Uniform Plan. Therefore, the Magistrate Judge was well within her discretion to deny the defendant's motion as untimely on this basis. Here again, denial of an untimely motion is not an absolute rule. It has been this court's practice to allow the late movant to demonstrate "good cause" for its failure to timely file and to permit late filings when they are supported with such "good cause." As previously noted, the Magistrate Judge's order does not contain anything which indicates to this court that the Magistrate Judge sought explanation for the untimely filing or considered such a "good cause" exception.

C. TIMELINESS OF THE CLAIMS OF PRIVILEGE

Finally, the Magistrate Judge determined that the defendant had waived its assertion of privilege which served as the basis for its motion for a protective order:

> Moreover, defendant did not make a claim of privilege in a timely manner. Defendant produced the documents in question for in camera review by the court. The documents appear to have been generated during late 1989 and early 1990, and there does not seem to be any dispute between the parties regarding the documents' relevancy to this lawsuit. Because the documents were in existence well in advance of the filing of this

> lawsuit, and the defendant does not claim that the documents came to light only recently, they should have been disclosed, or a claim of privilege made, as part of the defendant's pre-discovery disclosure of core information or a supplement thereto. At the absolute latest, defendant should have made an effective claim of privilege in response to plaintiff's request for production of documents.

Maxey, Civil Action No. 3:95cv6-D-A (N.D.Miss. Sep. 19, 1996) (Order Denying Motion for Protective Order, p. 3). The Magistrate Judge went on to explain that the defendant failed to comply with the requirements of Fed.R.Civ.P. 26(b)(5) when it responded to the plaintiff's request for production of the documents in question by merely stating "the information is protected from disclosure by the work product doctrine and the attorney-client and self-critical analysis privileges. When GM investigates the kind of allegations plaintiff describes in this request, it is either in response to, or in anticipation of, litigation."

The undersigned agrees with the Magistrate Judge that the defendant failed to adequately assert its claim of privilege in a timely manner. The Uniform Plan requires that such assertions of privilege must be made at the time of their initial disclosures to the opposing party, and the defendant should have at least

supplemented its initial disclosures[1] as the Uniform Plan

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[1]Pursuant to amendments to the Uniform Plan made effective July 1, 1996, Section Four (I)(A)(l)(b) requires that:

> When a party withholds information by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things that produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. The privilege log should contain at least the following information: name of the document; description of the document; date; author(s); recipient(s); and nature of the privilege. To withhold materials without such notice subjects the withholding party to sanctions under Rule 37, FRCP, and may be viewed as a waiver of the privilege or protection.

While the defendant's initial disclosures in this case

requires. Uniform Plan, Section Four (I)(A)(7). As well, the defendant's response to the plaintiff's request for production for these documents was insufficient to meet its obligation under the Federal Rules of Civil Procedure. Fed.R.Civ.P. 26(b)(5) (stating party seeking protection of privilege "shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."). The generalized response of the defendant to the Plaintiff's request for production was merely an assertion of the privilege itself, and does not explain the nature of the documents such that anyone could assess the applicability of the privilege claimed. The defendant argues that if this conclusion is correct, then the plaintiff's discovery responses were also deficient. That matter is not before the court, and is irrelevant in any event. The Magistrate Judge was well within her discretion in deeming the privilege waived in this case, particularly in light of the inadequate response provided to the request and to provide a description of the document in a supplementation to its initial disclosures. Fed.R.Civ.P. 26(b)(5). This court cannot say that the Magistrate Judge's decision in this matter is either clearly erroneous or contrary to law.

III. CONCLUSION

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were served before this amendment became effective, this enactment governed the defendant's obligation to make supplemental disclosures after July 1, 1996.

The Magistrate Judge had a sufficient reason to deny the defendant's motion for a protective order, in that the defendant had waived the asserted privilege by failing to adequately present its claim of privilege. The Magistrate Judge also possessed the discretion to deny the defendant's motion as untimely for two different reasons, but there is nothing before the court that indicates that she entertained the defendant's proffer of "good cause" reason for the untimely filing. In any event, as the Magistrate Judge had a valid ground for the denial of the motion, this court shall not disturb the order. This court cannot say that the Magistrate Judge's order in this matter was either clearly erroneous or contrary to law.

A separate order in accordance with this opinion shall issue this day.

This the 18th day of November 1996.

/s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ARCHIE MAXEY, PLAINTIFF

v. Civil Action No. 3:95cv6-D-A

GENERAL MOTORS CORPORATION DEFENDANT

MEMORANDUM OPINION

By order dated September 19, 1996, United States Magistrate Judge S. Allan Alexander denied the defendant's motion for a protective order to prevent the disclosure in discovery of internal documents related to an entity known as the "Ad Hoc Passive Restraint Committee." Maxey v. General Motors Corp., Civil Action No. 3:95cv006-D-A (N.D. Miss. Sep. 19, 1996) (Alexander, M.J.) (Order Denying Motion for Protective Order). In denying the motion, Magistrate Judge Alexander ordered that the defendant General Motors "shall produce forthwith to plaintiff the documents at issue." Aggrieved with the decision of the Magistrate Judge, General Motors presented to this court objections to the Magistrate Judge's order. This court, upon consideration of the objections, declined to disturb the Magistrate Judge's decision. Maxey v. General Motors Corp., 1996 WL 692222, *1 (N.D.Miss. Nov.15, 1996) (Civil Action No. 3:95cv006-D-A) (Davidson, J.) (Memorandum Opinion and Order). General Motors then requested that this court reconsider its ruling of November 15, or

in the alternative, grant the certification of an interlocutory appeal of that decision pursuant to 28 U.S.C. § 1292(b). This court denied reconsideration and also denied the request for alternative relief. Maxey v. General Motors Corp., 1996 WL 737537, *1 (N.D.Miss. Dec.16, 1996) (Civil Action No. 3:95cv006-D-A) (Davidson, J.) (Memorandum Opinion and Order).

As this court noted in its December 12 Memorandum Opinion, this court's denial of certification pursuant to 28 U.S.C. § 1292 (b) was unappealable. See, e.g., In re Air Crash Disaster, 821 F.2d 1147, 1167 (5th Cir.1987) ("The decision to certify an interlocutory appeal pursuant to section 1292(b) is within the discretion of the trial court and unappealable.") (citing In re McClelland Engineers, Inc., 742 F.2d 837, 839 (5th Cir.1984), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985)). Therefore, General Motors instead sought other relief which was available to it. On December 19, 1996, GM petitioned the Fifth Circuit Court of Appeals for a Writ of Mandamus to be issued to this court:

> vacating the trial court's order requiring production of documents over GM's claims of privilege and directing it to rule on the substantive merits of GM's privilege claims.
>
> General Motors additionally petitions . . . for a limited writ of mandamus directing the District Court to stay its November 18 order pending resolution of this mandamus petition.

Petition for Writ of Mandamus, p. 24. The Fifth Circuit denied the petition on January 6, 1996. Maxey v. General Motors, No. 96-60861 (5th Cir. Jan. 6, 1997) (Order Denying Petition for Writ of Mandamus). To the present extent of the court's knowledge, General Motors has not yet complied with Magistrate Judge Alexander's order of September 15.

I. The present state of affairs

Even in light of all of the above, Magistrate Judge Alexander's September 19 order remains in force and the defendant General Motors must still "produce forthwith to plaintiff the documents at issue." Neither this court nor the Fifth Circuit Court of Appeals has stayed that ruling. In light of the facts of this case and of the Fifth Circuit's recent denial of General Motors' petition for a writ of mandamus, the court shall provide GM with another opportunity to produce these documents. The defendant shall comply with the September 19 order on or before 12:00 p.m. on Friday, January 17, 1997.

In the event that General Motors fails to comply with today's directive from the court, the undersigned shall fashion an appropriate remedy. This court has already been required to repeatedly sanction General Motors throughout this litigation for its conduct. E.g., Maxey, Civil Action No. 3:95cv006-D-A (N.D.Miss. Apr. 16, 1996) (Order imposing sanctions against GM); (N.D.Miss. Jul. 18, 1996) (Order imposing sanctions against GM); (N.D.Miss. Nov. 11, 1996) (Order imposing sanctions against GM). Thus far, the imposition of lesser monetary sanctions appears to be ineffective. In light of General

Motors' net worth, a more proportionate monetary sanction may be required. Of course, the simple imposition of monetary sanctions is not this court's only option. This court may incarcerate the defendant's corporate representatives or its counsel for civil contempt, strike parts of the defendant's pleadings in this cause or even enter judgment against it on the plaintiff's claims. Should GM fail to comply with this court's orders and the undersigned determine that the imposition of sanctions are appropriate, the undersigned will have no reservations in imposing whatever sanction or combination of sanctions that are required. Likewise, this court will have little patience for incomplete compliance with the court's orders. Any failure on the part of General Motors to fully comply with this production requirement will also subject it and its counsel to scrutiny for sanctions.

A separate order in accordance with this opinion shall issue this day.

This the 10th day of January 1997.

/s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KENNETH M. AND SARAH M. BARANOWSKI,

Plaintiffs

vs. No. LR-C-96-222

GENERAL MOTORS CORPORATION, ET AL.,

Defendants.

MEMORANDUM AND ORDER

This suit involves an automobile accident in which Kenneth Baranowski was driving a 1989 Oldsmobile Cutlass Supreme coupe, and his wife, Sara Baranowski, was seated in the front passenger seat. The plaintiffs' car collided with another vehicle and at some point during the accident, Sara Baranowski was ejected from the car. The plaintiffs have brought claims against the defendants, alleging that the door latch and seat belt system of the Cutlass are defective and are the cause of Sara Baranowski's injuries.

Now before the Court is the motion of the defendant General Motors Corporation ("GM") for a protective order, to which the plaintiffs have responded, GM has filed a reply, and the plaintiffs have responded to the reply. Upon careful review of the pleadings, the Court finds that the motion should be denied.

I.

Defendant GM states in its motion that certain interrogatories and requests for production of documents propounded by the plaintiffs require the disclosure of documents and information pertaining to a GM committee known as the Automatic Restraint Task Force ("Task Force"). The Task Force, GM states, was made up of GM engineers and was created in 1989 at the request of GM legal staff "who sought to formulate legal advice and litigation strategies in connection with claims made against GM alleging defects in the passive restraint systems installed in a variety of GM vehicles." Defendant GM asserts the documents are protected from disclosure by the attorney-client privilege and the work-product doctrine.

Plaintiffs contend that the motion was untimely filed and therefore GM has waived the privilege. In addition, they argue that the documents are not privileged and are not work product.

On April 18, 1996, the plaintiffs served their First Requests for Production of Documents, which included the following challenged request:

> Request for Production No. 19: Produce a copy of any reports generated by GM's "Motors Insurance Corp." or any other statistical or accident data collected by Leonard Evans or any GM employee(s) or contractor that addressed ejection of belted occupants in motor vehicle accidents.

On June 4, 1996, the plaintiffs served their Second Interrogatories and Requests for Production of Documents, which included the following challenged interrogatories:

> Interrogatory No. 55: Please list any and all information which Defendant has regarding any known accidents or failures involving the 1989 Oldsmobile Cutlass Supreme and other GM vehicles that have the same or similar passenger restraint system and/or the same door latch mechanism.
>
> Interrogatory No. 56: Please list any accidents which Defendant may have heard about with regard to the 1989 Oldsmobile Cutlass Supreme and other GM vehicles that have the same or similar passenger restraint system and/or the same door latch mechanism but were not verified.
>
> Interrogatory No. 57: Please list any investigations by Defendant of reported failures or accidents relating to the 1989 Oldsmobile Cutlass Supreme and other GM vehicles that have the same or similar passenger restraint system and/or the same door latch mechanism.

> Interrogatory No. 58: Please list any claims or lawsuits filed against Defendant or its subsidiaries or affiliates (including dealerships) relating to such accidents or failures.

Defendant GM responded to the discovery requests on May 31, 1996 and August 16, 1996 respectively, objecting to these and other requests for production on the grounds that they "may ask for information protected from disclosure by the work-product doctrine and the attorney-client or investigative (or consulting expert) privilege." On March 5, 1997, in response to plaintiffs' motion to compel, GM filed this motion for protective order.

A.

The plaintiffs urge that GM waived its privilege claims because it failed to comply with Fed.R.Civ.P. 26(b)(5) which provides: "When any party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

The plaintiffs assert that GM did not describe the nature of the documents it claimed to be privileged, and cite the Comment to Rule 26 which states: "A party must notify other

parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." The plaintiffs urge that because of other litigation[1], GM was fully aware of the existence of the Task Force documents when it set forth blanket privilege objections without any reference to any particular documents or categories of documents. The plaintiffs further complain that GM filed its motion for protective order months after the responses were served and did not supplement its responses in order to inform the plaintiffs of the existence of the Task Force documents.

Defendant GM contends that no specific discovery request required production of the Task Force documents. It also argues that because the requests that arguable call for production of Task Force documents also ask for a large number of documents unrelated to the subject matter of the lawsuit, the Task Force documents are not "otherwise discoverable" and are not responsive to any appropriate request for production.

"Whether a responding party states a general objection to an entire discovery document on the basis of privilege, or generally asserts a privilege objection within an individual

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[1]*See* Pls.' Am. and Sub. Resp. to Defs.' M. Protective Order, Ex. D.

discovery response, the resulting "blanket objection" is decidedly improper. This fact should no longer be "news" to a responding party." *Eureka Financial Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991) (citations omitted).[2] Concerning GM's argument that the discovery requests ask for large numbers of documents that are unrelated to the subject matter of the lawsuit, the Advisory Committee's Notes to Rule 26(b)(5) state the procedure that should be followed:

> If a broad discovery request is made - for example, for all documents of a particular type during a twenty year period - and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four year should then be either produced (if not privileged) or described (if claimed to be privileged).

The Court finds that GM waived any privilege claim on the Task Force documents by failing to object and list the documents in compliance with Rule 26(b)(5). Defendant GM failed to fulfill its responsibility of supplying relevant

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[2]This opinion was written in anticipation of the codification of paragraph 5 of Rule 26(b).

information underlying its claim of privilege in compliance with Rule 26(b)(5). It seems to the Court that GM could have at least mentioned "Task Force Documents" in response to one if not more of the challenged interrogatories and requests for production. However, GM made no effort to comply with a reasonable identification effort. This fact as well as GM's knowledge of the existence of the Task Force documents mitigates in favor of denying the motion for protective order and compelling disclosure.

B.

In addition, the Court finds that the Task Force documents lost any privilege status when the findings and conclusions of the Task Force were communicated to door design engineers who incorporated those findings into automobiles. Mr. Robert Sinke, who was the director of GM Engineering Analysis Group, a group of engineers who functioned as technical consultants to the GM legal staff, stated that the findings of the Task Force were first communicated to GM's General Technical Committee and then, at that Committee's request, they were communicated to the appropriate door and door latch type engineers. *See* Pls.' Am. and Sub. Resp. to Defs.' M. Protective Order, Ex. G.

As the court stated in *Courteau v. St. Paul Fire & Marine Ins. Co.*, 821 S.W.2d 45, 47-48 (Ark. 1991): "'The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. . .'" (*quoting Philadelphia v.*

Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962). Based upon the testimony of Sinke, the Court finds that the documents produced by the Task Force are not protected by the attorney-client privilege.

The Court further finds that the Task Force documents are not protected by the work-product doctrine. The work-product doctrine is governed by Fed.R.Civ.P. 26(b)(3), and it applies only to documents "prepared in anticipation of litigation." *Peterson v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992). The protection applied to the mental processes of attorneys and allows lawyers to work with a certain degree of privacy. *Upjohn Co. v. United States*, 449 U.S. 397-399 (1981). Even documents prepared in anticipation of litigation, however, may be discoverable upon a showing of (1) substantial need and (2) an inability to obtain the documents by other means without undue hardship. Fed.R.Civ.P. 26(b)(3).

The Court finds that many of the documents were prepared predominantly by a team of engineers as opposed to attorneys, while others include charts and statistics that do not constitute legal analyses. In addition, the Court finds that the plaintiffs are unable to obtain the documents by other means without undue hardship.

II.

IT IS THEREFORE ORDERED that the motion for protective order filed by defendant General Motors Corporation (doc. 25) is denied.

DATED this 15th day of May, 1997.

/s/ Susan Webber Wright
United States District Judge

Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

No. 97-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,
Petitioner,

v.

VALERIE LYNN GREAR AND PAUL C. NORDBERG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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No. 97-746

IN THE

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GENERAL MOTORS CORPORATION,

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v.

VALERIE LYNN GREAR AND PAUL C. NORDBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

This brief is being filed pursuant to S. Ct. R. 15.8, in order to call the Court's attention to "intervening matter[s] not available at the time of [petitioner's] last filing." *Id.* The petition in this case continues to raise an important procedural issue that directly affects every circuit court and district court nationwide: namely, whether a court of appeals lacks jurisdiction to entertain *either* an interlocutory appeal *or* a petition for writ of mandamus challenging a trial court order compelling the disclosure of privileged communications. The purpose of this supplemental brief is to explain that further developments in the underlying case do not impede the Court from addressing and resolving this issue, which warrants plenary review here.

General Motors filed the petition for *certiorari* in this case on October 31, 1997. On November 1, 1997, General Motors filed a stay application with Justice Stevens, and a response was filed on November 12, 1997. The response did not dispute that the petition and stay application in this case have identified a clear and irreconcilable three-way conflict among the courts of appeals on an important procedural issue, but pointed out that the underlying case was already set to go to trial on December 15, 1997, and noted that the grant of a stay would interfere with the trial date. Justice Stevens referred the stay application to the full Court, and it was denied on November 19, 1997.

Every other circuit court to have addressed the issue has concluded that parties may avail themselves of either interlocutory appeal or mandamus as a mechanism to challenge a trial court's compelled disclosure of documents or other communications protected by the attorney-client privilege and work-product doctrine; in a recent decision, the Third Circuit held that parties may avail themselves of both mechanisms. *See In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997); *see also* Pet. 8-12. The Sixth Circuit alone has required litigants to disobey orders compelling disclosure of privileged documents and go into contempt before seeking appellate review, *see* Pet. App. 14a-17a, which General Motors believes would all but eliminate judicial protection of "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

After the Court denied General Motors' application for stay to block compulsory disclosure of the privileged documents at issue in this case, General Motors faced the same unpalatable choice that it had described in the petition: either violate the trial court's order and go into contempt, with no clear prospect of any basis for appellate review to protect its rights, or disclose the privileged documents at issue in this case. *See* Pet. 12-17. General Motors chose the latter alternative, as counsel informed the Court by letter dated November 26, 1997. *See* Appendix A (attached). In that letter, counsel stated that General Motors would address the significance of these developments in its reply brief on the petition for certiorari. *Id.*

Respondents thereafter submitted a letter dated November 25, 1997, waiving any response to the petition unless the Court directed them to file one. *See* Appendix B (attached).

Two further points merit attention here. *First*, General Motors' disclosure of the privileged documents at issue in the underlying case, subject to the terms of a protective order that has been imposed by the trial court, does not moot the procedural issue that is cleanly presented here. The same significant issues that General Motors has raised about the scope of the attorney-client privilege remain with respect to the admissibility and use of these documents at trial. Therefore, the restricted and confidential disclosure of these documents in discovery does not implicate the broader concerns that would surround the use and discussion of these documents at trial in open court. Nevertheless, the Sixth Circuit's rulings continue to bar General Motors from obtaining any meaningful review of the classification and handling of these privileged documents in advance of the trial in this case, and thus to undermine the strong protection that courts have traditionally afforded to the attorney-client privilege. And as to the compelled pre-trial disclosure of General Motors' privileged documents, the restrictive nature of the Sixth Circuit's rulings guarantees that this issue is one "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911).

Second, the trial court recently postponed the trial date in the underlying case. As announced at a recent scheduling conference, the trial is not slated to commence until July 21, 1998. This new development has eliminated any concern that the Court may have had, when it ruled on the stay application, that granting plenary review here would interfere with an imminent trial date.

The procedural issues raised in the petition are important to the consistent administration of justice in the federal courts. Plenary review is warranted to clarify the proper procedures that are to be followed by litigants and the lower federal courts in ensuring appropriate protection for the attorney-client

privilege. Those questions remain directly at issue in this case, and they warrant review and resolution on *certiorari* at this time. The Court should, at a minimum, call for a response to General Motors' petition.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Attorneys for Petitioner

December 18, 1997

ATTACHMENTS

ATTACHMENT A

November 25, 1997

VIA FEDERAL EXPRESS

Honorable William Suter
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: General Motors Corporation, Petitioner
v. Valorie Lynn Grear, et al., Respondents
A-33 (97-746)

Dear General Suter:

I am enclosing a waiver form indicating that we do not intend to file a response to the Petition for Writ of Certiorari filed by General Motors Corporation unlesss [sic] one is requested by the Court.

Sincerely,

BURCH, PORTER & JOHNSON, PLLC

W.J. Michael Cody

WJMC/sjl
Enclosure

cc: Counsel of Record/Attorneys for Petitioner
per Attached List (w/encl.)

ATTACHMENT B

November 26, 1997

VIA HAND DELIVERY

General William K. Suter
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *General Motors Corporation v. Valorie Lynn Grear and Paul C. Nordberg*, Docket No. 97-746

Dear General Suter:

This letter is to inform the Court of a further development in the above case. General Motors, lacking a stay of the district court's discovery order and under pain of contempt, has disclosed the Task Force documents at issue subject to a protective order. General Motors will address the significance of this development in its reply brief in support of its petition for writ of certiorari.

Yours sincerely,

Paul T. Cappuccio

Supreme Court, U.S.
FILED
FEB 17 1998
CLERK

No. 97-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,
Petitioner,

v.

VALERIE LYNN GREAR AND PAUL C. NORDBERG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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15 pp

QUESTIONS PRESENTED

1. Whether a circuit court of appeals is jurisdictionally barred from hearing an appeal from a trial court order compelling the disclosure of privileged communications, or whether such an appeal properly comes within the "collateral order" doctrine laid down by the Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

2. Whether a circuit court of appeals is jurisdictionally barred from reviewing a petition for mandamus taken from a trial court order compelling the disclosure of privileged communications because a party is obliged to disobey the order and go into contempt before it can seek any review on the merits?

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No. 97-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,

Petitioner,

v.

VALERIE LYNN GREAR AND PAUL C. NORDBERG,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

Respondents make two points in their brief in opposition to *certiorari*. First, they concede that the circuit courts are split on the basic procedural issue raised in the petition: whether a court of appeals lacks jurisdiction to entertain either an interlocutory appeal or a petition for writ of mandamus that challenges a trial court order compelling disclosure of privileged communications. *See* Opp. 7. General Motors believes that the issue poses a three-way circuit split, and that the decision below imposes an undue burden upon litigants seeking to protect privileged documents. Respondents suggest that the circuit split is only two-way, but in any event do not deny that the courts of appeals are divided and confused in this area. *See id.*

Respondents also do not contest that the questions presented in this case pose important issues of judicial administration that should be clarified for lower courts and litigants alike. Instead, their second point is that they ultimately should prevail on the merits of the privilege questions at stake in the underlying case. *See* Opp. 10-11. Although General Motors strongly takes issue with this claim, at this juncture, questions about the merits simply are not germane to the jurisdictional issues raised in the petition.

Once again, the issue at stake here is what mechanism for relief shall be available to litigants in the federal courts to seek immediate relief from an order requiring the disclosure of documents that are protected by the attorney-client privilege. The Third Circuit has recently ruled that a party may take an interlocutory appeal in these circumstances under 28 U.S.C. § 1291, and that mandamus relief is also available pursuant to 28 U.S.C. § 1651 as an alternative means of obtaining immediate review. *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997).

In contrast, most courts do not permit an interlocutory appeal in those circumstances, but do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1484 (1997); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992); *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1490-92 (9th Cir. 1989); *In re Burlington Northern, Inc.*, 882 F.2d 518, 522 (5th Cir. 1987); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971).

In this case, however, the Sixth Circuit panel imposed a far more draconian rule, holding that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief -- indeed, that both avenues of relief are *barred* on jurisdictional grounds. *See* Pet. App. 14a-15a;

see also id. 16a-17a. It held that in order to obtain immediate review, a party must go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions. The other circuits have uniformly rejected this position, noting that sanctions imposed against a party are not subject to immediate appeal unless the trial court chooses to proceed by way of criminal contempt, rather than through civil coercive contempt or by imposing some form of discovery sanctions. *See, e.g., Admiral Ins. Co.*, 881 F.2d at 1490-92. They have thus recognized that forcing a party to disobey the trial court's order and submit to sanctions offers no assurance that the party can avoid irreparable harm by pursuing an immediate appeal.

Respondents do not attempt to defend the ruling below on this central jurisdictional issue. Instead, they suggest that the Sixth Circuit itself is divided on the proper approach, pointing to a more recent ruling by a different panel of three other judges that adhered to the more traditional rule employed by other circuits, which allows privilege issues to be adjudicated on an interlocutory basis through mandamus review. *See In re Perrigo Co.*, 128 F.3d 430, 436-37 (6th Cir. 1997) (quoting and citing, *inter alia*, *Chase Manhattan Bank*, 964 F.2d at 163-65, and *Admiral Ins. Co.*, 881 F.2d at 1492-94). That ruling, significantly, does not ever mention or seek to distinguish the rulings and orders in this case. It also does not mention or seek to distinguish the Third Circuit's recent ruling in the *Ford Motor Co.* case, which allows parties to seek review of such orders by *both* mandamus *and* a permissible interlocutory appeal under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Indeed, the *Perrigo* panel cites with approval the Third Circuit's earlier decision in *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992), which had allowed mandamus review, but not an appeal, in these circumstances, apparently mistaking it to be the Third Circuit's

current approach to the procedural issue raised here. *See Perrigo*, 128 F.3d at 435.[1]

The panel decision in the *Perrigo* case thus echoes decisions by other circuits that have at times -- reflecting no orderly or consistent pattern -- held that the more drastic contempt route is a jurisdictional requisite before either mandamus or an appeal can be pursued in an interlocutory setting. *See, e.g., In re Kessler*, 100 F.3d 1015, 1016-18 (D.C. Cir. 1996) ("in the ordinary case, a litigant dissatisfied with a district court's discovery order must disobey the order, be held in contempt of court, and then appeal that contempt order on the ground that the discovery order was an abuse of discretion").[2] General Motors has already explained at length why this view is flawed -- because it effectively eliminates any mandamus review, because it mistakenly assumes that a party in this impasse can merely opt for criminal contempt, and because forcing parties into contempt is unsatisfactory as a matter of basic judicial administration, *see* Pet. 12-17 -- and so will not reprise those arguments here.

The recurring problem in this whole area of the law is that the lower courts have tended to mix inapposite lines of authority without appreciating the dramatically different effects of the same procedures in different settings. For example, the orders below in this case, without comment or discussion, rely in turn on the Sixth Circuit's inconsistent prior rulings in

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[1] The party petitioning for mandamus in *Perrigo* had also sought to bring an interlocutory appeal in that case to challenge the trial court's privilege ruling, which was denied. *See* 128 F.3d at 434.

[2] Like the decision of the Sixth Circuit panel in this case, the D.C. Circuit in *Kessler* did not explain or substantiate its bare assertion that if "Dr. Kessler does disobey the district court's order and is held in contempt, he will have a right to an appeal." 100 F.3d at 1018. As explained in the petition for *certiorari*, this will only be true where the trial court decides to proceed by means of criminal contempt, rather than by means of coercive civil contempt or by imposing some form of discovery sanctions against a party litigant. *See* Pet. 14-15.

Coleman v. American Red Cross, 979 F.2d 1135 (6th Cir. 1992) (allowing an interlocutory appeal), *United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (requiring a party to submit to contempt in order to challenge privilege rulings by the trial court), and *Dow Chem. Co. v. Taylor*, 519 F.2d 352 (6th Cir. 1975) (disallowing an interlocutory appeal but allowing mandamus review), which, in turn, have never been reconciled. Many of these rulings -- along with the D.C. Circuit's decision in the *Kessler* case -- trace their favorable references to the contempt route as the most appropriate and perhaps the only permissible avenue for obtaining immediate review of such trial court orders to *United States v. Ryan*, 402 U.S. 530 (1971), where this Court held that contempt was an available mechanism for seeking review of a trial court order requiring the production of records:

> But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or other similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id. at 532.

This doctrinal lineage, however, is fundamentally flawed. *Ryan* involved production of documents by a nonparty before a federal grand jury. In that instance, not only is the underlying case criminal in nature, but also any proceedings against a nonparty necessarily result in a separate, final judgment against the nonparty that will be appealable by him or her immediately. These considerations, however, cannot simply be imported into proceedings in *civil* cases involving a *party* to the litigation, which do not lead to the same results either as a matter of procedure or substance. Nonetheless, courts frequently place mistaken reliance upon *Ryan* in arriving at results that garble and misapply the underlying legal rules. *See, e.g.*, *Dow Chem. Co.*, 519 F.2d at 355 ("*Ryan* involved production of documents

before a federal grand jury, but we think the reasoning of the Court is applicable here" in a civil case where the order was directed at a party); *Coleman*, 979 F.2d at 1138 ("A litigant faced with an adverse discovery order may obtain review, however, by violating the order and incurring sanctions or a contempt citation.") (quoting and citing this same passage from *Dow Chem. Co.*); *Kessler*, 100 F.3d at 1017 ("an order holding a litigant in contempt for failing to obey a discovery order is considered final," even supposedly in a civil case involving a party defendant) (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) (citing in turn *Ryan*)).

There is no question -- and, again, respondents do not dispute -- that the lower courts are confused and divided over the important procedural question raised here. Some courts, at some times, hold that neither appeal nor mandamus will lie to protect a party's assertion of privilege, but instead the party must proceed by flouting the trial court order and seeking to be held in contempt -- an avenue that, the courts fail to recognize, may or may not produce an appealable order. Other courts generally hold that a party cannot take an appeal in this situation, but may proceed by way of mandamus. The Third Circuit, in an opinion whose cogent analysis of the *Cohen* doctrine has yet to be refuted by any other court, has held that a party *can* take an interlocutory appeal to protect the attorney-client privilege, and can also proceed in the alternative by means of mandamus. This three-way split among the circuit courts on an issue so basic to judicial administration and so critical to the preservation of the legally sacrosanct attorney-client privilege needs to be addressed and clearly resolved by this Court.

The issue is also cleanly and properly presented in this case. Here, the Sixth Circuit held that it was *jurisdictionally barred* from considering either General Motors' appeal or its mandamus filings because General Motors instead was required to go into contempt to challenge the trial court's order compelling the disclosure of privileged documents. *See* Pet. App. 14a-15a; *see also id.* at 16a-17a. Thus, General Motors has had no appellate review at all of its underlying claims to

protect the full scope of its lawful privilege. If instead the position of many circuits were to be adopted, General Motors would be entitled to immediate review of its claims, but only under the more demanding standards that apply to applications for writ of mandamus. *See, e.g.*, *Perrigo*, 128 F.3d at 435 (to justify mandamus relief, petitioner must show not only clear error, but also that the order in question "raises new and important problems, or issues of law of first impression"). And if instead the position of the Third Circuit were to be adopted, General Motors would be entitled to immediate review of its claims under the straightforward legal standards governing appeals, which merely require showing that the trial court committed reversible error in rendering its ruling. The petition for *certiorari* thus warrants plenary review here.

Two final points deserve brief mention here. *First*, General Motors has already defused the issue that was urgently presented in its earlier stay application by disclosing to respondents the privileged documents at issue in the underlying proceeding, subject to the terms of a protective order that was imposed by the trial court. Nonetheless, as discussed at greater length in the supplemental brief that General Motors filed on December 18, 1997, the disclosure of these documents does not moot any of the important issues presented on the merits of General Motors' underlying claims of privilege, which remain pertinent with respect to the admissibility and use of the documents at trial. *See* Supp. Br. 3.[3]

Second, respondents have repeated their claim that, in any event, they will be entitled to prevail on the merits of their

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[3] General Motors also noted that as to the compelled pre-trial disclosure of privileged documents, the restrictive nature of the Sixth Circuit's rulings guarantees that the issue is one "'capable of repetition, yet evading review.'" Supp. Br. 3 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911)). The more recent *Perrigo* ruling does not change this at all, though it adds a certain freakish quality to the circumstances in which this issue may arise, depending on which judges of that court and other courts are assigned to review such issues in a given case.

claim that General Motors waived the attorney-client privilege with respect to these documents. *See* Opp. 10-12. Of course, General Motors tried to join issue on the merits of this underlying dispute when it filed its appeal and mandamus petition in the Sixth Circuit. It is plain from the orders issued below that both applications were denied on jurisdictional grounds, *not* on the merits. *See* Pet. App. 15a (holding that General Motors could not take an interlocutory appeal, because "if a party seeks an immediate appeal of the matter, the party should submit to contempt and then appeal the contempt ruling"); *see also id.* 16a-17a (denying mandamus because a party "seeking mandamus must have no other means of obtaining the relief he desires" and General Motors "can obtain appellate review by submitting to contempt and appealing the contempt ruling"). Respondents' observation that two other trial courts have rendered rulings similar to that rendered by the trial court in this case is simply beside the point, because the issue here involves the preliminary question of whether and how a party like General Motors can obtain effective review of such rulings from a circuit court of appeals.[4]

Even on the merits, however, the substantive issues raised by General Motors in the underlying proceeding are substantial in their own right. The trial court order compelling the disclosure of privileged communications raises unsettled questions about the extent to which an extra-textual

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[4] Of course, the unexplained fact that the Fifth Circuit denied a writ of mandamus in *Maxey v. General Motors Corp.*, No. 96-60861 (5th Cir. Jan. 6, 1997), *see* Opp. App. 15a, does not advance the inquiry at all; if anything, by ruling contrary to the jurisdictional holding reached in the Sixth Circuit's orders in this case, it underscores the circuit split on the issue of whether an interlocutory appeal or mandamus relief should be available in this situation. The settlement reached in *Baranowski v. General Motors Corp.*, No. 97-2968EALR (8th Cir.), *voluntarily dismissed*, after the Eighth Circuit had ordered the case set for briefing and argument on the jurisdictional issue of whether appeal or mandamus should lie from such trial court orders, also merely underscores the need to clarify this issue for the benefit of all the lower federal courts.

requirement to create a privilege log can properly be imported into Rule 26 of the Federal Rules of Civil Procedure. On its face, the Rule contains no such rigid requirement; instead, it merely requires a party raising a privilege objection to "make the claim expressly" and to "describe the nature of the documents" sufficiently to "enable other parties to assess the applicability of the privilege." *See* Fed. R. Civ. P. 26(b)(5). On the facts of this case, it is plain that General Motors complied with the absolute letter and spirit of this Rule; yet the trial court erroneously found a waiver of the privilege. Such issues of waiver are typically important enough to warrant review and resolution by means of immediate appeal, *see, e.g.*, *Ford Motor Co.*, 110 F.3d at 965 n.10, or on mandamus, *see, e.g.*, *Perrigo*, 128 F.3d at 438-39, yet General Motors has had no meaningful opportunity to obtain review of the orders imposed in this case. That is the sole issue squarely before the Court at this time, and it merits plenary review.

More importantly, respondents do not and cannot dispute that the procedural issues cleanly raised by the petition for *certiorari* directly affect every circuit court and district court throughout the nation. In order to facilitate sound judicial administration, the Court should seize this opportunity to establish a clear and uniform rule governing the proper relationship between trial courts and reviewing courts in allowing a party to vindicate a rightful claim of attorney-client privilege, which has long served to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Those broader interests have been disserved in this case, and will continue to be disserved as long as the lower courts continue to maintain inconsistent approaches to the basic procedural issue that is presented to the Court in this case.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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February 17, 1998